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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 596

DAN CECERE,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Dan Cecere, respectfully prays that a writ of certiorari issue to review the decisions of the Supreme Court of New Jersey, rendered on November 14, 1960, one of which dismissed petitioner's appeal to said court and the other of which denied petitioner's petition for certification to the Appellate Division of the Superior Court of New Jersey, which latter court affirmed the judgments of conviction of your petitioner in the Essex County Court, Criminal Division, on two separate indictments, Indictment No. 1668 charging petitioner with Bookmaking on March 20, 1959; and Indictment No. 1669 charging petitioner with Keeping a Gambling Resort on March 21, 1959, both in alleged violation of R. S. 2A:112-3.

Opinions Delivered in the Courts Below.

These cases were tried on October 15, 16 and 19, 1959, in the Criminal Division of the Essex County Court of the State of New Jersey before the Honorable James R. Giuliano, judge of said court, and a jury. Petitioner was found guilty of the charge contained in each of the two indictments. No opinion was rendered in that court except that at the sentencing of your petitioner on January 6, 1960, a colloquy ensued between defense counsel and the court which is not reported officially or unofficially, but a copy of which is appended hereto as Appendix A.

An appeal was taken to the Appellate Division of the Superior Court. While said appeal pended, petitioner made a Motion to said Appellate Division To Set Aside the Judgments of Conviction, etc. (Appendix B) on the ground that perjury had been committed by one or more of the State's principal witnesses at the trial of said two cases; and said petitioner submitted in support thereof the testimony given by one George Gottesman subsequent to his trial and before another tribunal, which said testimony is appended hereto as Appendix F. The appellate division orally denied said motion without comment and without giving any reasons for its action. The order denying the motion is not contained in any official or unofficial reports. A copy of the order denying the motion is appended hereto as Appendix B1.

On June 10, 1960, the Appellate Division of the Superior Court disposed of the main appeal and affirmed the judgments of conviction rendered in the Essex County Court. The opinion of the court is appended hereto as Appendix C. It is not officially or unofficially reported.

Thereafter your petitioner filed a direct Appeal to the Supreme Court of New Jersey from the judgment of said Appellate Division and simultaneously therewith filed with said Supreme Court a Petition for Certification to the Appellate Division of the Superior Court. On November 14, 1960, the Supreme Court of New Jersey, by separate orders, and without any opinion or comment, dismissed petitioner's Appeal and denied petitioner's Petition for Certification. The order dismissing the Appeal is not reported to this date, a copy of which order is appended hereto as Appendix D. The order denying the Petition for Certification is not reported to this date, a copy of which order is appended hereto as Appendix E.

Jurisdiction.

The order of the Supreme Court of New Jersey dismissing the Appeal from the Appellate Division of the Superior Court is dated November 14, 1960 and was entered on November 14, 1960. A copy thereof is appended hereto as Appendix D.

The order of the Supreme Court of New Jersey denying petitioner's Petition for Certification to the Appellate Division is dated November 14, 1960 and was entered on November 14, 1960. A copy thereof is appended hereto as Appendix E.

The statutory provision conferring jurisdiction upon this Court to review the aforesaid orders by Writ of Certiorari is 28 U. S. C. sec. 1257(3).

Questions Presented for Review.

1. Was the petitioner afforded a fair trial and was he denied due process within the purview of the Constitution of the United States when he was convicted upon the tainted and perjured testimony of two principal state's witnesses; and when every appropriate state tribunal, from the trial court to the Appellate Division of the Superior Court of New Jersey to the Supreme Court of New Jersey, although formally apprised of the perjury, ordered no hearings (though requested to do so), took no testimony and made no findings, refusing to act on the proven charge of perjury presented by the petitioner and never denied by the Prosecutor?

2. Was the petitioner afforded a fair trial within the purview of the Fourteenth Amendment of the Constitution of the United States when the trial court (a) over objection dispensed with the requirement of proof as to where the crime was committed; (b) refused to permit petitioner to cross examine witnesses in that regard; (c) refused to permit the petitioner to ascertain whether the crime was committed in New Jersey or some other sovereign state; (d) threatened petitioner's attorney with legally disastrous consequences if he argued the point before the jury; (e) determined without inquiry that the crime was committed in the State of New Jersey; and (f) abridged the petitioner's right to a trial by jury.

3. Was the petitioner herein afforded a fair trial within the purview of the Fourteenth Amendment of the Constitution of the United States, Section 1 thereof, where the

petitioner did not take the stand at the trial and the Judge charged the jury that his failure to testify in his own behalf raised a permissible inference that he could not truthfully deny facts which tended to prove his guilt; whereupon the judge recited "facts" which he felt tended to prove the guilt of the defendant and which he felt the defendant was called upon to deny; and the Prosecutor improperly commented in his summation on petitioner's failure to take the stand? In other words was the charge and the summation such that the petitioner's privileges and immunities were violated and was he denied due process of law?

4. Was the petitioner afforded a fair trial within the purview of the Fourteenth Amendment of the Constitution of the United States, Section 1 thereof, when the trial court committed a melange of errors, substantial in nature, in conflict with established law, procedure and rules of court, so as to constitute a denial of due process?

5. Did the aggregate of errors set forth herein, if not one specifically, render the petitioner's trial unfair and a denial of due process under the Fourteenth Amendment of the United States Constitution?

Constitutional Provisions, Statutes and Criminal Rules of Practice and Procedure Which the Cases Involve.

Fourteenth Amendment to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

New Jersey Statutes 2A:112-3:

"Any person who, habitually or otherwise, buys or sells what is commonly known as a pool, or any interest or share therein, or makes or takes what is commonly known as a book, upon the running, pacing or trotting, either within or without this state, of any horse, mare or gelding, or conducts the practices commonly known as bookmaking or pool selling, or keeps a place to which persons may resort for engaging in any such practices, or for betting upon the event of any horse race or other race or contest, either within or without this state, or for gambling in any form, is guilty of a misdemeanor, and shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment in the state prison for not less than 1 year nor more than 5 years, or both.

This section shall not be construed to apply to pari-mutuel betting at race meetings as authorized by the constitution of this state or any statute passed in pursuance thereof."

Rules Governing Practice in the Appellate Division of the Superior Court, 2:9-1(a):

"Upon the final determination of any cause the court shall prepare and file an opinion of the reasons for its decision. Any judge dissenting, or concurring only as to result, shall file a separate opinion stating the reasons for his action. The clerk shall immediately notify the counsel of each party of the court's decision, and shall forward him a copy of the opinion."

Statement of the Case.

INTRODUCTORY NOTE.

While Statement of the Case would appear to be exceedingly lengthy, all pertinent facts have been included to assist the court in not having to ferret out the facts from a voluminous record.

Two separate indictments were returned against the Defendant-Petitioner by the Essex County Grand Jury (1958 term), to wit:

(1) No. 1668—for bookmaking (R. S. 2A:112-3) on *March 20, 1959;* and

(2) No. 1669—for Keeping a Gambling Resort (R. S. 2A:112-3) on *March 21, 1959.*

The indictments were consolidated for trial in the Essex County Court by order of the trial court, without petitioner's consent and were tried on October 15, 16 and 19, 1959.

A summary of the testimony of the State's witnesses is as follows:

On March *21,* 1959, Detectives DeStefano, Kenny and Kraft of the Essex County Prosecutor's Office arrived at the Berkeley Bar. The Berkeley Bar is one large room. The front contains a circular bar with stools and the rear, separated by open arches, has tables and chairs for patrons. The first detective to enter the Bar was DeStefano, at 12:35 p. m. He was wearing no apparel which indicated he was a law enforcement officer. He had on a corduroy jacket, a tie, shirt and charcoal pants (D10a-35 and 36).* There were 18 or 20 people at the bar. He walked to the rear por-

* "D a" refers to the record abstract printed as the Defendant's Appendix in the Appellate Division of the Superior Court of the State of New Jersey, which Appendix was used on appeal by the petitioner herein to the Supreme Court of New Jersey.

tion of the tavern and saw the defendant "talking to a colored gentleman that was near a Skilo machine" (D10a-33 and 34). DeStefano approached the two and with badge in hand identified himself. He ordered defendant to "stay where you are." To his left were two colored men, one seated at a table and another standing to his right, some four feet away from the defendant. In front of the seated man on the table was an Armstrong sheet (Ex. S-4), dated March 21, 1959; and also a piece of paper on which were written two horses' names. He had a pencil in his hand (D11a-19 to 23). The piece of paper (and pencil) referred to was a Rheingold beauty contest ballot (Ex. S-5). The sole writing, on the reverse side thereof, was the name of two horses. A pad of Rheingold beauty contest ballots was on said table (Ex. S-7). DeStefano seized both the articles. At the Skilo machine, the defendant was in the process of cashing a check for a man named "Joyner". The check was in defendant's hand and the cash was being counted out. The State admittedly attaches no criminal significance thereto (D54a and 55a). As DeStefano was seizing Exhibits S-4 and S-5 he observed some movement behind him and "turned to see defendant heading for the front door running down along the bar" (D19a-5 to 7). He yelled out "Stop. Don't let that guy get away" (D19a-8 to 9). On the Skilo machine was a "World Telegraph folded" (D19a-10 to 13) (Ex. S-6). Detective Kraft had followed DeStefano into the Bar and Detective Kenny was at front door. It was at the front door that defendant ran into Kenny whereat with Detective Kraft's assistance he was returned to the Skilo machine with handcuffs on him (D61a). Defendant was asked to empty his pockets and he refused and started yelling "Look what they are doing to me. Don't let them do this to me. You be my witness. Call

my lawyer. Don't let them get away with it" (D22a-32 to 36). To this point the defendant was not placed under arrest nor was any other person in the Bar placed under arrest (D58a-20 to 38). When defendant returned as aforestated he was carrying his blue jacket in his arms, torn by—"got caught. I don't know, sir" (D59a-20) (Ex. S-15).

With handcuff dangling from one wrist DeStefano went into defendant's pocket (D61a-32, D60a-1 to 9) and pulled out a green note book (Ex. S-12), which contained some sheets of paper, marked Ex. S-12A, B and D. Exhibit S-12A is lined with "48 squares. To the left we have the track, the race, the horse's name, amounts of money" (D28a-16 to 18).

The defendant was again ordered to empty his pockets and he called out "Call my lawyer. Don't let them do this to me" (D26a-25 to 28). Upon further order defendant pulled out of his pocket an Armstrong sheet (Ex. S-11) and two packets of bills, $600 in one (Ex. S-8); and $66.00 in the other (Ex. S-9); and seven checks, one of which was the check of the man (Joyner) which the defendant was in the process of cashing at the Skilo machine (D65a-23 to 28). The State concedes it to be so and the checks were not offered in evidence.

While DeStefano was going through this process, Detectives Kraft and Kenny were searching the 18 to 20 persons who were in the premises (D65a-13 to 40, D66a, D67a) and found *nothing* (D68a-18 to 23). At this point it may be stated that no search warrant of person or property was in the possession of the raiding party (D68a-25 to 26). In spite thereof the raiding party searched the first floor, second floor, basement and the back porch (D116a-1 to 18);

and also the building in the rear (D116a-22 to 25), and admittedly found *nothing* that related to gambling (D116a-20 to 21) or the betting of horses (D116a-35 to 36 and D74a-37 to 40).

While DeStefano was searching defendant the telephone rang. It was 1:10 p.m. (D75a-26 to 27). It was the phone in a public pay station located in the tavern.

Detective Matthew W. Kraft testified for the State as follows concerning the alleged telephone call (D75a-23 to 40 and D76a-1 to 32):

> "Q. Did you observe where in the premises the telephone is located? A. Well, I observed one telephone because I answered it.
>
> Q. When did you answer the telephone? A. At 1:10 p. m.
>
> Q. Was this before the defendant went out of the building or after? A. After, sir.
>
> Q. He went out of the building and came back in again with you and Kenny. Is that right? A. Yes, sir.
>
> Q. When you answered the phone will you tell us what was the conversation you had.
>
> Mr. Connell: I object, if your Honor please, unless the proper foundation is laid for the testimony as to telephone conversation. I think the law is pretty well settled on the caution that is to be used in the admission of such evidence. I object to it unless the proper foundation is laid.
>
> Mr. McKeown: I will connect it up, Judge. We are going to have the person here in court, if the Court please, who made the telephone call.
>
> The Court: All right. I will overrule the objection in view of the representation by the Prosecutor. Proceed.

(96) By Mr. McKeown:

Q. What was the conversation that you had? A. I answered the phone and I said hello, and the man on the other end of the phone asked for Dan. I said, 'Dan isn't here right now. He can't answer the phone.'

I said, 'What is it you want?'

He said, 'I want Wise Master in the 9th at Lincoln Downs, twenty and ten.'

I said, 'Who are you?'

He said, 'Oh, Dan knows who I am. I am George Gottesman from Succasunna.'

I said, 'Well, how does Dan know you?'

He said, 'Well, I have got horses of my own,' and that was about the substance of the conversation.

Q. Is the gentleman in court now? A. Yes, sir.

Q. Will you point him out for me, please. A. The man with his head on his left hand in the second row on the left.

Mr. McKeown: Will you stand up, sir. Your name is?

A Voice: George Gottesman."

Cross examination of Kraft (D84a-11 to 21):

"Q. How long were you on the telephone, would you say? A. Oh, 20, 25 seconds or so.

Q. In that 20 to 25 seconds you had the entire conversation which you have testified to. Is that correct? A. Yes, sir.

Q. Did you ever have contact with Mr. Gottesman, who was the voice on the other end? A. Prior to the raid? No, sir.

Q. At the time you testified in Orange Municipal Court did you make any mention at all of this telephone conversation? A. I don't think so, sir, no.

Q. When did you first meet Mr. Gottesman? A. Well, I first met him sometime after this investigation. I served a subpoena on him at his home."

George Gottesman, the alleged initiator of the telephone call testified as follows (D92a):

"*Direct examination by Mr. McKeown:*

Q. Mr. Gottesman, where do you live? A. 4 Mark Lane, Succasunna.

Mr. Connell: I didn't get that address.

(The last answer is read by the Court Reporter.)

Q. Mr. Gottesman, do you recall making a telephone call to the Berkeley Bar on March 21? A. I wouldn't know whether it was the Berkeley Bar. I just made a telephone call.

Q. You made a telephone call. To whom did you make the telephone call? A. Well, I asked for a Danny. That was all.

Q. Did you know Danny's last name? A. No.

(119) Q. Had you called there before? A. Never.

Q. But you had called and you asked for whom? A. Danny.

Q. And did somebody answer it? A. That's right.

Q. Was it Danny? Do you know him? A. No, I wouldn't know, but the party who answered the phone said that he was in the back and he couldn't get to him.

Q. What did you do then? A. Well, he asked me what I wanted to do and I told him I wanted to place a bet.

Q. Did you give him the name of a horse and the amount of money to bet? A. I placed a bet but I don't recall the horse's name—Market something or Wise Market.

Q. Do you recall a horse Wise Master? A. Something like that.

The Court: Don't lead him, Mr. Prosecutor.

Q. Where did you get the telephone number from? A. I was at a luncheonette one day and a fellow was asking me whether I had any hot tips. I had some horses running and I told him even if I had I couldn't do anything with them because I couldn't place a bet.

Mr. Connell: I object to this, if your Honor please.

The Court: I won't permit that unless it (120) is with the defendant. I will strike that. Now, the only reason I permitted the telephone conversation on the date in question was that it relates to the alleged charge here, and that's the only reason, but I will not permit any other conversations.

Mr. McKeown: All right. I have no further questions.

* * * * * *

GEORGE GOTTESMAN, resumes the stand.

The Court: You may cross examine, Mr. Connell.

Mr. Connell: If your Honor please, may I have the last question and answer?

(The last two questions and answers are read by the Court Reporter.)

Cross examination by Mr. Connell:

Q. Mr. Gottesman, on the 21st of March did you know the defendant? A. No, sir.

Q. Had you ever met him before that date? A. No, sir.

Q. Had you ever been in the Berkeley Tavern in Orange? A. No, sir.

Q. Had you ever placed a bet with the defendant?

A. No, sir, except I called that day.

Q. That was the first time you ever called. Is that correct? A. That's right.

Q. Had you ever made a bet away from the race track before?

Mr. McKeown: Objected to.

The Court: Sustain the objection.

Mr. Connell: May I have the grounds, if your Honor please?

The Court: I will sustain the objection. It is immaterial and has nothing whatsoever to do with (125) this case as to what this witness might have done on some other occasion which does not concern this defendant.

Mr. Connell: I submit, if your Honor please, it is very material because of the circumstances surrounding the connection of this witness with this particular indictment.

The Court: I have sustained the objection. Your objection will be noted.

Q. Did you pay any money to the defendant in furtherance of that bet which is purported to have been made that day? A. That was actually never consummated and I never paid.

Q. You never consummated the bet? A. No.

Mr. Connell: That's all.

The Court: Any further re-direct?

Re-direct examination by Mr. McKeown:

Q. Did you know at that time any of the detectives of the Prosecutor's office? A. No, sir.

Q. Did you know the gentleman seated alongside of me, Mr. Kenny? A. No, sir, I never met him until court here.

Q. Did you know Detective DeStefano? (126) Will you stand up, Detective DeStefano.

Mr. Connell: I submit if your Honor please, the witness has already answered the question. He said he doesn't know.

The Court: He has answered it.

Mr. McKeown: Except for the fact I want to pinpoint it.

The Court: Now you want him to look at the detectives individually? I will permit it but he has already answered it.

Mr. McKeown: All right, sir. No further questions.

Re-cross examination by Mr. Connell:

Q. Did you know Detective-Sergeant Kraft of the State Police? A. No, sir.

The Court: Now we have got all the detectives in.

Mr. McKeown: Thank you."

Insofar as the testimony of said Gottesman is concerned, the trial court said:

"The Court: You are not that naive to think some stranger would call up a place * * *. You don't think that I put much stock in Mr. Gottesman's cross examination, do you? You don't think that I would believe that story * * *."

"The Court: The jury is bound by it but I am not bound by it * * *" (D141a-25 to 40).

Then again at D142a-8, the Court stated, "I am not naive enough to come to the conclusion that he was a total stranger." Later on the court again reiterated its disbelief in the story of Gottesman (D142a-28).

During the course of trial the following took place. Defense counsel asked the following question on cross examination of one of the State's "expert" witnesses:

> "Q. Now, Detective DeStefano, I again direct your attention to Exhibit S-12A. Can you by looking at that tell us *where* the memorandum was made?" (D64a-20 to 22).

The prosecutor objected and the following colloquy took place in open court in the presence of the jury:

> "The Court: *I don't see how that's material. It doesn't make any difference where it was made.* I don't follow your point." (Emphasis added.)
>
> "Mr. Connell: If your Honor please, the indictment charges that the defendant at the City of Orange in the County of Essex——
>
> The Court: What's the gravamen of the charge? Isn't it the recording of bets, if these are bets, and I am not passing upon that. That's a question for the jury. I am not passing upon whether this man recorded the bets or took the bets. That's another question for the jury but that's the gravamen of the charge, isn't it?
>
> Mr. Connell: But we have the jurisdictional question as to where the offense, if any offense was actually committed, was committed.
>
> The Court: Did you object to it?
>
> Mr. McKeown: Yes, sir.
>
> The Court: I will sustain the objection. If that's your reason for it, I will sustain the objection. The arrest was made in Orange, and I don't see any point in going any further than that. I don't think there is any question of jurisdiction involved here" (D64a-20 to D65a-12).

At a later point in the trial, defense counsel asked a question (D121a-20 to 22) which went to jurisdiction. Before an answer could be given the Court interrupted, and after some colloquy, defense counsel said:

> "Mr. Connell: My purpose was to lay the foundation to ask him if they (meaning the bets) were taken at Orange, New Jersey, on the date of the indictment" (D123a-1 to 5).

The court answered (D123a-5 to 18):

> "I don't think we can go into that. He was arrested in Orange, it was found on his person in Orange, and this Court would have jurisdiction. You may have some grounds in the event he is convicted on my ruling. I don't think so, but that will be my feeling and my ruling *and the jury is not to decide the question of jurisdiction.* They can only decide his innocence or guilt based upon the evidence and the evidence alone. (Emphasis supplied.)
>
> Mr. Connell: Isn't it incumbent upon the State to prove the complete offense charged in the indictment?
>
> The Court: Yes, it is for the State to prove all the essential elements of the crime. It would appear to me that the State has established the question of jurisdiction by reason of arrest • • •" (D123a-20 to 40).

The Court further stated:

> "• • • As to the question of jurisdiction, there is no doubt in the Court's mind that this court has jurisdiction • • • (D134a-23, 24) • • • The question the jury has to decide is: Did this defendant make and take what is commonly known as a book on March 20 by reason of the evidence that has been presented by the State?" (D134a-38 to 40).

At page D154a-22, the Court said:

> "The Court: Mr. Connell, in your argument you made some point as to jurisdiction. I am bringing the case of State *v.* O'Shea to your attention which is in 16 N. J. In that case we had the same situation that appears here and the court held that it was prima facie evidence where in the defendant's possession was found horse bets and arrested in a particular county at the time he had those horse bets in his possession, that that would give that particular county jurisdiction. I am bringing this case to your attention because you may say something to the jury and then I would have to charge them that the jurisdiction was here and I wouldn't want the jury to think that you are stating something that was contrary to the law. Now, you can use your own judgment. I think I ought to bring this to your attention so that you don't go astray in your summation. Now, of course, if you want to make a point of jurisdiction then I will have to charge the jury that there can be no question this Court has jurisdiction and it may have its effect against you rather than in favor of you" (D154a-22 to 40, D155a-5, 6).

The trial court threatened that if defense counsel mentioned where the crime was committed, he would

> "permit the prosecutor to argue, that the defendant was arrested in Orange, a complaint was made in Orange, the Grand Jury of this county returned an indictment charging him, the Court must rule on the jurisdiction" (D123a-26 to 33).

The Court further threatened that if defense counsel argued jurisdiction,

> "then I will have to charge the jury that there can be no question this court has jurisdiction" (D154a-38 to 40).

The defendant in this case produced two character witnesses (D149a to D157a-33) both of whom testified to defendant's good reputation for being a law abiding citizen, and one of whom testified also to defendant's good reputation for being truthful, both of which particular traits were suggested by the trial court (D149a to D158a). One of the character witnesses also testified to defendant's good reputation for the conduct of law-abiding businesses. At a point during the cross examination of the first character witness, the Prosecutor asked:

> "Q. Did you know the defendant on May 10, 1939?" (D151a-9).

Objection was made thereto, and the court called counsel to side bar whereat a colloquy took place between court and counsel at which time the prosecutor produced an F. B. I. sheet indicating that "a Daniel Cecere was convicted of receiving stolen goods on April 13, 1939 and that he was sentenced by the then Judge Walter D. Van Riper and sentence was one year in the County Penitentiary. Execution of this sentence was suspended and he was placed on probation for three years" (D152a-2 to 20).

The trial court said, "I will have to permit the prosecutor to ask the question" (D153a-9, 10). Whereupon, the prosecutor asked the following question:

> "Q. Mr. Minichiello, have you heard that on May 10, 1939 this defendant was convicted of the crime of receiving stolen goods and was sentenced by Judge Walter Van Riper to one year in the Essex County Penitentiary, execution of the sentence suspended, and was placed on probation for three years at twenty-five cents a week? *Did you know that?* A. No, sir." (D153a-18 to 24).

On cross examination of the second character witness, Dr. Joseph E. Higi, the Prosecutor asked these questions, to wit:

"Q. Doctor, have you heard that the defendant was convicted of the crime of receiving stolen goods in May 1939? *Did you know that, Doctor?* Did you hear that, Doctor?" (D156a-20 to 26).

"Q. Doctor, have you heard that he was arrested on June 18, 1936 for carnal abuse?" (D157a-6 to 7).

The only witnesses produced by the defendant were the two character witnesses. The defendant did not take the stand.

After both sides rested the defendant requested the court to charge the jury as follows:

Requests to Charge of Defendant.

No. 4. Where evidence is merely circumstantial, so that the defendant could only meet such evidence by a general denial of the charge, he does not have to testify and he cannot be criticized for such refusal to testify nor can the jury infer any guilt from his failure to give evidence.

No. 8. I charge you that the term "Bookmaking" in its common meaning, which is the meaning in which the term is used in both the amendments of the State Constitution adopted in 1897 and in 1939 outlawing bookmaking by name, and in the enforcement acts for each amendment, meant the making or taking AND recording or registering of bets or wagers on races and kindred contests.

Thereupon the prosecutor summed up to the jury.

Parts of Prosecutor's Summation are hereinafter set forth:

(1) See: D167a-26 to 30, to wit:

"I don't know whether any of you gentlemen know anything about horse race betting, horse racing, or not. Draw on your own recollection. * * *"

(2) See: D169a-12 to 25, to wit:

"You have a right to draw on your own experiences to determine whether or not that sometimes these bookmakers even run charge accounts and take these calls over the telephone, and, 'I will take your bet and if you win I will pay you when you come in. If you lose you pay me. You will pay me anyway.'

This is against the law of our State—bookmaking. We have the tracks where we can go if we want to go to a horse race and you can bet your silly heads off down there at a track if you want to do it. Now, who gets paid for that? The State of New Jersey. You and I and his Honor get something out of that but what do you get out of a bookmaker? Nothing. Nothing. He doesn't pay income taxes on it."

(3) See: D169a-26 to 40 and D170a-1 to 8, to wit:

"Now, we have just a little bit more in this case and that is this: The defendant didn't take the witness stand. He didn't take the witness stand. I can't compel him to take the (236) witness stand. Judge Giuliano can't compel him to take the witness stand. Nobody can compel him to take the witness stand but he has the right to take the witness stand regardless of anything to tell you, ladies and gentlemen, whether or not that instrument, 12a, found in his book, the little green book, was what he had bet and that it was not as Detective De Stefano and Detective Kenny said, regarding of bets made to a bookmaker.

There is no evidence in this case at all that this was written by him but he has it in his possession and from that you have a right to infer that he cannot deny truthfully that that was his book. Now, again I warn you to take your law ffom Judge Giuliano and particularly on the failure to take the witness stand and the inferences that are raised thereby."

(4) See: D170a-27 to 30, to wit:

"Now, one more thing. During the course of the cross examination of one of the character witnesses produced by the defendant it was brought out the defendant had a criminal record."

The trial judge charged the jury as follows (as to defendant's failure to take stand):

"The State contends from all its proofs that it has established the guilt of the defendant beyond a reasonable doubt on both of these indictments and asks at your hands a verdict of guilty on both indictments.

Now, the defendant interposes in this case a defense of denial. He contends the State has not established his guilt beyond a reasonable doubt and asks at your hands a verdict of not guilty on both indictments.

You will remember, and I charge you this as a matter of law that the defendant did not take the witness stand in his own defense. Under our law a defendant cannot be compelled to testify but he is competent to testify and he has a right to testify. His failure to be a witness in his own behalf raises no presumption of guilt but if facts are testified to which tend to prove his guilt, which facts he could by his oath deny, his failure to testify in his own behalf raises a permissible inference, and you will remember my definition of inference, that he could not truthfully deny those facts.

You will note I said facts which he could by his oath deny. The facts in this case which the Court recalls which the defendant could by his oath deny are these—but again use your own recollection—one, the testimony of the officers that the defendant had on his person a sheet on which there were recorded alleged horse race bets; two, the testimony of the officers as to the attempted flight of the defendant; three, the testimony of the officer as to what occurred in the rear room at the table in the defendant's presence; four, the testimony of the officers as to their finding an Armstrong sheet on this table and a Morning Telegraph in the defendant's place of business; and, five, the testimony of the officer as to the use of the telephone in the defendant's place of business. However, I charge you that it is our law that the defendant here is entitled to have you consider all the facts in evidence, even if he does not deny by his own oath such facts as incriminate him or tend to incriminate him, and he is entitled to the presumption of innocence, unless and until you, the jury, agree on a verdict of guilty upon a consideration of all the evidence." (D182a-18 to D183a-13.)

(The Court's charge as to "Bookmaking.")

"The first indictment charges in effect that the defendant, Dan Cecere, on the 20th day of March 1959 did in the City of Orange unlawfully make and take what is commonly known as a book on horse races * * *" (D174a-35 to 38).

"The statute of our state * * * provides as follows: 'Any person who shall habitually or otherwise make or take what is commonly known as a book upon the running, pacing or trotting, either within or without this state, of any horse, mare or gelding, or shall conduct the practices commonly known as bookmaking, * * * is guilty of a misdemeanor.'" (D175a-8 to 18).

"Members of the jury, I will first discuss bookmaking, the thing denounced as a crime by this statute, that is, the making or taking of what is commonly known as a book on horse racing" (D175a-38 to D176a-2).

"Under this statute bookmaking in common understanding signifies the making of a book of bets, that is, the making or taking *or* recording or registering of bets or wagers on races or kindred contests. Bookmaking imports some method of recording bets on horse racing or kindred contests. Bookmaking, as I have defined it to you, and as referred to in this statute, is unlawful in New Jersey and it always was" (D176a-2 to 15).

"In order to justify a conviction on the indictment charging bookmaking, under the statute the State has the burden to prove beyond a reasonable doubt that the defendant recorded or registered the bets on horse races and at the time he had the intent to make and take what is commonly known as a book of bets on horse races. If proof of one of these elements is lacking there can be no conviction on this indictment" (D176a-15 to 23).

"First as to the element of recording or registering bets on horse races, under our law, members of the jury, it is not necessary that witnesses be produced to testify that they saw an accused record or register bets on horse races. However, it must be established from all the evidence that the defendant did record or registered bets or that the bets were recorded or registered by some other person for the defendant and at his direction. In determining this question you may consider the finding of certain exhibits on the defendant's person and the surrounding circumstances that existed at the time" (D176a-23 to 33).

"As to intent, you realize that intention is a condition of the mind and can only be determined by refer-

ence to conduct or from inferences from conduct, words, or acts. Intent means a purpose to do something, a resolve to do a particular act or to accomplish a certain thing. The intention of an accused may be gathered from his acts and conduct and from all he said and did at the particular time and from all the surrounding circumstances that existed at the time and place" (D176a-34 to D177a-5).

"So that there will be no misunderstanding I will repeat what proof is required in order to justify a conviction on the indictment charging bookmaking. You must be satisfied beyond a reasonable doubt as I have defined it to you that the defendant recorded or registered the bets and that he had the intent to make and take what is commonly known as a book of bets on horse races" (D177a-22 to 29).

(The Court's Charge as to "Flight")

"On one phase of the case the State contends that the defendant undertook to engage in flight, undertook to flee from his place of business shortly after the police arrived at his tavern, and that in doing so the State contends he had in his possession the book of bets and an Armstrong sheet dated March 20, 1959, which are marked as Exhibits in evidence.

If you believe from the testimony beyond a reasonable doubt that the defendant knowing of the acts in which he had engaged and for the purpose of evading an accusation based on those acts took refuge in flight, then you can consider that flight in connection with all other testimony and evidence in the case because if unexplained the flight of a defendant after the commission of a deed is a circumstance tending to prove consciousness of guilt." (D177a-8 to 22).

(The Court's Charge as to "Purpose of cross examination of character witnesses")

"Now, there is another matter which I want to call to your attention and that has to do with the prior conviction of crime of this defendant.

The law as to the effect of a prior conviction of crime is as follows: A prior conviction, of course, members of the jury, does not prove, nor does it tend to prove, the defendant's guilt of the crimes presently charged against him. The law permits convictions to be shown for one purpose and that one purpose is affecting the credibility of the defendant.

The defendant in this case did not take the witness stand. Therefore you cannot consider the evidence of a prior conviction against the defendant." (D183a-14 to 26).

(The Court's Charge of "Inference")

"An inference, members of the jury, is a legal deduction from a proven fact." (D172a-31, 32).

On October 19, 1959, a verdict of guilty was returned by the jury as to each indictment.

Date of sentence, after adjournments, was fixed for January 6, 1960.

Prior to sentence, Frank A. Palmieri, attorney for the defendant-petitioner, visited the Prosecutor of Essex County (in charge of prosecution), Brendan T. Byrne and presented him with evidence of substantial nature that the State's principal witness, said George Gottesman, committed PERJURY in his testimony at the trial and that he did so with the knowledge of Detective Kraft, also a State witness and a member of the Prosecutor's staff.

The Prosecutor refused to accept the evidence, refused to investigate the allegation, refused to make required inquiry and refused to present the matter to a Grand Jury or the trial court.

On the day of sentence and prior to pronouncement thereof by the trial court, said Frank A. Palmieri, attorney of defendant-petitioner, made a Motion and Plea on Behalf of Defendant (See: Appendix A) wherein the charge of Perjury was presented and made known to the court, to wit:

"I can make this representation to the Court at this time because I made that representation to the Prosecutor of this county that we have evidence of substantial nature that George Gottesman committed perjury on the stand before this court. I will go further than that and I say that he did it with the knowledge of Mr. Kraft.

The Court: I don't understand. In what respect? I am interested if you say Mr. Gottesman committed perjury.

Mr. Palmieri: If your Honor please, Mr. Kraft lives no more than three or four miles away from Mr. Gottesman. He was assigned to the barracks in that locale for many years. Every person our investigator interviewed in and around that area knows George Gottesman. Every police chief, every police officer in and around that area knows George Gottesman, who has been in the horse racing business for many, many years. He is an elderly man. Everybody knows George Gottesman. The question was asked of Gottesman whether he knew Kraft and the answer was no. The question was asked of (11) Kraft if he knew Gottesman and the answer was no and all of our investigation reveals that he had to know, he does know him.

The Court: I don't subscribe to that deduction. I don't even know my next door neighbor and I mean that sincerely. I shouldn't say my next door neighbor but the family that lives across the street, and the reason I say that is because I saw him being arrested across the street from my house, a man that I didn't know. I didn't know he lived there. That happened

and the funny thing, I might state it here, the father of my Court Reporter was making the arrest. That was Monday morning of this week and I didn't know who he was and I still don't know who he is.

Mr. Palmieri: I understand, and I understand that I don't know some of my neighbors either, but I also understand that your Honor's position and my position——

The Court: If you can show me there was perjury committed I think I am under a duty to consider that but I don't think that that's perjury, so I am not going to pay any (12) attention to that, Mr. Palmieri.

Mr. Palmieri: Well, the position of this Court, if your Honor please, and my position with reference to whether we know our neighbors or not——

The Court: That doesn't indicate perjury. If you had substantial statements in an affidavit that either Gottesman or the Sergeant or both had committed perjury, of course I would be interested in ascertaining what the situation is but I don't think I can consider your statements as you have presented them to me.

Mr. Palmieri: If your Honor please, I would like to put these statements in the record because——

The Court: Mr. Palmieri, I want you to understand I am not going to stop you from putting anything in the record but when you mentioned that you have proof a witness or witnesses committed perjury, I inquired of you because certainly I would not want to impose sentence on this defendant if there was a question that a witness or witnesses committed perjury. I must state that I can't (13) agree with you that that amounts to perjury, but you may proceed.

Mr. Palmieri: In order that the record may be straight, my words were substantial evidence to indicate that perjury was committed by both George Gottesman and Kraft, and I just want to follow one thought the Court expressed. In spite of your posi-

tion and mine, we don't know our neighbors, but the fact remains when you are one of two police officers who patrolled this entire area for a number of years, and Mr. Kraft was one of them in this area as a law enforcement officer, George Gottesman has lived and resided for many years, and the fact that George Gottesman was a suspect of arson on several occasions upon which an investigation was made, the further fact when George Gottesman runs horses at Monmouth Park Mr. Kraft must of necessity sign his card when he is given permission to run his horses. All of those things, if your Honor please, I ask that you take into consideration by conference with the Prosecutor or otherwise to determine whether or not these (14) are or are not facts.

The Court: Are you asking me to confer with the Prosecutor on this?

Mr. Palmieri: Yes, sir.

The Court: I don't intend to do it because you have not presented anything which would indicate to me that perjury was committed." See: D196a, D197a, D198a and D199a.

Thereupon (January 6, 1960) judgments of conviction were entered and the defendant-petitioner was sentenced as follows:

(1) No. 1668—not less than one year nor more than three years in State Prison; and

(2) No. 1669—not less than one year nor more than three years in State Prison, this sentence to run concurrently with sentence imposed upon Indictment No. 1668.

Then and there, counsel for defendant informed the court that he would like to make a motion to have defendant

admitted to bail pending prosecution of his appeal and asked the court whether it would hear the application at that time or at the conclusion of its sentence list.

The court refused to permit the defendant to either make the motion or to argue the same, and did arbitrarily and unreasonably state: "I have considered your application as if you have (made) it. I have denied your application" (See: Appendix A).

Immediately thereafter defendant filed and served a formal motion that he be admitted to bail pending prosecution of an appeal to the Appellate Division of the Superior Court of New Jersey. The trial court denied bail. A motion to admit defendant to bail pending appeal was made to said Appellate Division and same was granted.

The defendant appealed both judgments of conviction to the Appellate Division of the Superior Court of New Jersey. While said appeal pended the defendant-petitioner pursued the assertion made by his attorney before the trial court and before sentence that the defendant had evidence of substantial nature that the two principal state's witnesses, Gottesman and Kraft, had committed perjury in the trial of the causes. As the result thereof defendant-petitioner was able to obtain the testimony under oath of said George Gottesman which proved without doubt that both Kraft and Gottesman lied under oath at his trial. This matter was formally presented to the Appellate Division of the Superior Court of New Jersey by way of a motion to set aside the judgments of conviction on the ground of said perjury (Appendix B).

One of the most important phases of these cases evolves around a telephone call allegedly made by one George

Gottesman to the defendant's place of business. This call was allegedly received by Detective-Sergeant Matthew W. Kraft, a member of the State Police assigned at that time to the Essex County Prosecutor's Office. Testimony concerning the contents of the telephone conversation was introduced into evidence over defendant's objections (D75a-33 to D76a-10). Detective-Sergeant Kraft testified that he received the call from a person who identified himself as George Gottesman (D75a-22 to D76a-31) and testified to the contents of the conversation. He further testified that *he did not know George Gottesman* prior to the telephone call being received by him (D84a-16 to 25).

"Matthew W. Kraft, for the State—Cross:

Q. Did you ever have any contact with Mr. Gottesman who was the voice on the other end? A. Prior to the raid? No, sir.

Q. At the time you testified in the Orange Municipal Court did you make any mention at all of this telephone conversation? A. I don't think so, sir, no.

Q. When did you first meet Mr. Gottesman? A. Well, I first met him sometime after this investigation I served a subpoena on him at his home."

George Gottesman testified on behalf of the State that he did make the aforesaid telephone call and testified to his version of the conversation had at that time (D92a-14 to D93a-10). He also testified that *he did not know Detective-Sergeant Kraft.*

"Re-direct examination by Mr. McKeown of Mr. Gottesman:

Q. Did you know at that time any of the detectives of the Prosecutor's Office. A. No, sir." (D96a-23 to 26).

"Re-cross examination by Mr. Connell of Mr. Gottesman:

Q. Did you know Detective-Sergeant Kraft of the State Police? A. No, sir.

The Court: Now we have got all the detectives in." (D97a-1 to 10).

It was contended by the defense from the very inception of the mention of said telephone call that it was spurious (D75a-33 to 40). This contention of spuriousness was maintained throughout the trial and the telephone call was vehemently attacked throughout the trial through the means of cross examination and argument (D81a-23 to 86a-8; D95a-21 to D96a-20; D97a-1 to 10; D97a-15 to D98a-18; D132a-34 to D133a-25; D141a-20 to D143a-15). As far as this defendant was and is concerned the alleged telephone call was spurious and the relationship between the initiator of the alleged telephone call and the recipient thereof prior to said call was of monumental importance.

A great deal of stress was placed upon this telephone call by the Prosecutor in his quest for a conviction (D75a-23 to D76a-32; D92a-1 to D93a-8; 96a-22 to 40; D125a-30 to 40; 139a-18 to 32). This importance is further demonstrated by the summation of the Prosecutor wherein he said:

"Now in addition to that we have Sergeant Kraft of the State Police assigned to the Prosecutor's office who answered the telephone, and this Mr. Gottesman wanted to know if Danny's there. Is he talking about the defendant? I don't know. I will tell you why we don't know in a little while. He said 'No, Danny isn't here. What do you want?'

'I want to place a bet.'

'What's your name?'

He gives the Sergeant his name. He said,

'I want to bet ten and twenty.' If my memory serves me correctly, that's what he wanted to bet--ten and twenty.

'All right I will tell him,' or words to that effect." (D166a-5 to 20)

"* * * and that also together with the telephone call, because that's only a means of communication only a means of communication to place your bet. You have a right to draw on your own experiences to determine whether or not that sometimes these bookmakers even run charge accounts and take these calls over the telephone, and 'I will take your bet and if you wish I will pay you when you come in. If you lose you pay me. You will pay me anyway.'" (D169a-10 to 18).

The alleged telephone call became and was the most salient and potent part of the State's case on both indictments.

The trial court itself treated the alleged telephone call as a very important factor in the case (D142a-1 to 5; D142a-22 to 24; D143a-15 to 28). This is further pointed out by the following excerpts from the judge's charge:

"While the officers were on the premises the telephone rang, which was answered by Sergeant Kraft. The person calling identified himself as George Gottesman and asked for Dan. He was told by the officer that Dan was busy and then asked that a bet of twenty and ten be placed on Wise Master, a horse entered in a race at Lincoln Downs. The State produced George Gottesman who corroborated the testimony of Sergeant Kraft" (D181a-35 to D182a-10).

"The facts in this case which the Court recalls which the defendant could by his oath deny are these— * * *; and, five, the testimony of the officer as to the use of the telephone in the defendant's place of business." (D182a-30 to D183a-5).

The defendant requested the court to charge the jury (Request No. 9) on the law concerning spuriousness of telephone cases (D191a-24 to 32). The trial court so charged the jury, to wit:

"9. I charge you that evidence of a telephone conversation may be considered by you in this deliberation to show the defendant's complicity in the defense charged in the indictment only when the circumstances surrounding the making of the call rebut every suspicion that the same may be spurious, and when it so identified the one initiating the call and the person whom he calls as associates in the enterprise on which the indictment is based."

After the trial and prior to sentencing, defense counsel and defendant employed the services of one Cornelius Ryan, a private investigator, to conduct an investigation to ascertain if George Gottesman and Detective-Sergeant Kraft knew each other prior to the arrest of defendant because of defendant's insistence that said telephone was never used for the purposes testified to and the alleged telephone call was in fact spurious. Mr. Ryan concluded, as a result of his investigation, that Detective-Sergeant Kraft and George Gottesman knew each other for sometime prior to the arrest of the defendant and that they had committed perjury in the trial of the causes. Frank A. Palmieri, Esq., the substituted attorney for the defendant, conferred with the Prosecutor of Essex County and made known to him

the facts and conclusions of said Cornelius Ryan. The Prosecutor of Essex County refused to follow the request made of him at that time by said Frank A. Palmieri that the matter be investigated and presented to the Grand Jury and the trial court.

For the purposes of chronology and assistance to the court, as previously stated and on the day of sentencing, Frank A. Palmieri made a motion and plea on behalf of defendant wherein he advised the Court that he had conferred with the Prosecutor and that he had evidence of a substantial nature that George Gottesman committed perjury in the trial of these causes (D196a-1 to D198a-17). The Court was also requested to confer with the Prosecutor relative thereto which the Court refused to do (D198a-34 to D199a-5).

Thereafter this appeal was taken to the Appellate Division of the New Jersey Superior Court, and in Point Four of the brief filed therein (Db10-23 to Db12-30), the defendant charged that the testimony of George Gottesman was false and unbelievable and that the telephone call was spurious; that because of those facts, the telephone call and the telephone conversation should not have been admitted into evidence; that the testimony was damaging; and that had said testimony been excluded, the verdict would in all probability have been one of acquittal.

So that, there can be no refutation of the insistent and persistent claim of the defendant that the telephone call was counterfeit and spurious.

While said appeal was pending and as the result of defendant's inability to further the investigation because

of lack of subpoena and other investigatory powers, it was conceived that the truth might be ascertained if George Gottesman could be placed under oath some way, somehow, and be subjected to rigid examination. It was thereupon decided that a petition be filed with the Board of Public Utility Commissioners to compel the New Jersey Bell Telephone Company to install a telephone at No. 140 South Essex Avenue, Orange, New Jersey, the site of the arrest, which service had been denied because of defendant's arrest and conviction and upon orders of the Prosecutor of Essex County.

On April 27, 1960, a hearing on said petition was held by the Board of Public Utility Commissioners before Hearing Examiner Jack Schwartz. Frank A. Palmieri, Esq. appeared for the Petitioner and Frank P. Combs, Esq. appeared for the Respondent, New Jersey Bell Telephone Company. George Gottesman was called to the witness stand by counsel for the Petitioner and he was duly sworn. Counsel for the Respondent immediately produced a copy of the record abstract of Petitioner's trial in the Essex County Court which had been supplied to him by the Prosecutor of Essex County and addressed the Court as follows:

> "Before this witness testifies, your Honor, I would like to inquire of counsel what his purpose is in putting this witness on the stand, generally, and what he intends to have him testify to. Because I have reason to know what it is, and I would like to object in advance, if I may."

The hearing examiner advised counsel to wait until specific questions were posed and then to object. The direct testimony began. After some ten questions were asked and answered, Mr. Combs addressed the Court as follows:

"At this point, your Honor if you will hold the answer, I would like to object to the questioning of this witness and the introduction of anything further from him, and further evidence, for the reason that this man was a witness at the trial, the criminal proceedings, and he testified to certain things that I know counsel is leading up to."

"* * *"

"Now this is an attempt by counsel to open up certain testimony that was given at the trial. I think it is highly improper, based on numerous decisions of this Board, which have stated that it will not look behind the motives of duly authorized police officials, including, of course, prosecutors."

"Therefore, I say that this has no place and no bearing, and I ask that further testimony from this witness be suppressed."

The hearing examiner overruled the objection and permitted Mr. Gottesman to continue his testimony. He testified concerning the very same telephone call with which we are concerned. Mr. Gottesman testified thereat that *he knew Detective-Sergeant Kraft* and had so known him for about 4 or 5 years. This of course was in direct conflict with his previous testimony in the trial of these causes wherein *he said he did not know Detective-Sergeant Kraft* (D97a-1 to 10). He also testified concerning the conversation had in said telephone call, which testimony *was not the same* as that given in the trial court, in that he referred to the place where he allegedly obtained the telephone number as a "diner" as distinguished from a "luncheonette" (D95a to D96a).

At the conclusion of Mr. Gottesman's testimony, Mr. Combs again addressed the Court:

"I should like to move at this time that the testimony which has been given here by Mr. Gottesman be stricken from the record,* * *"

"* * *, the only purpose in bringing Mr. Gottesman in here was to impeach him, impeach him as a witness and the testimony which he gave in the trial before the County Court of Essex.* * *".

"I say to your Honor and urge very strongly that all of the testimony that has been here given by Mr. Gottesman be stricken from the record,* * *"

A reading of the entire transcript of Gottesman's testimony before the Public Utility Commission (Appendix F) proves that Gottesman committed perjury while testifying in the trial court; that the insistent and persistent claim of the defendant that Gottesman committed perjury in his testimony below has been completely verified and sustained; and that the perjury consisted of salient material and relevant subject matter, without which there could not have been a conviction.

A motion was thereupon made by the defendant to the Appellate Division to set aside the judgments of conviction on the ground that perjury was committed by one or more of the state's key and principal witnesses at the trial of the cases (Appendix B).

The State filed in resistance thereto an Affidavit of George Gottesman (Appendix G) and an Affidavit of Matthew W. Kraft (Appendix H).

Said Motion contained six different prayers for relief. The motion was "denied" in open court without opinion or comment and without giving the reasons therefor (Appendix B1), even though such a denial could not possibly

have been made to each of its six (6) parts, for the relief sought was in the alternative and required granting of some and denial of others in order to be consistent and proper.

Thereafter, on June 10, 1960, the Appellate Division entered a judgment of affirmance of the convictions and filed an opinion in purported compliance with Rule 2:9-1(a), to wit:

> "Upon the final determination of any cause the court shall prepare and file an opinion of the reasons for its decision. * * *"

The Appellate Division's opinion DID NOT comply with said Rule 2:9-1(a), as will be specifically set forth hereinafter.

In defendant's appeal to the Appellate Division of the Superior Court of New Jersey, he raised the constitutional question here involved in Brief and Supplemental Brief for Appellant. The question raised was "The Defendant Was Not Afforded a Fair Trial." In support thereof your petitioner listed the following errors, the aggregate of which, if not any one specifically, rendered the trial unfair and partial, to wit:

(a) The trial court erred in ordering that both indictments be tried together. (Done by court order, without defendant's consent).

(b) The federal rule with regard to the exclusion of all evidence obtained through unlawful searches and seizures is the law of the land and should be adopted and embraced by the courts of the Superior Court of New Jersey. (Trial Court refused defendant right to cross examine State witnesses).

(c) The trial court erred in admitting into evidence testimony concerning an alleged telephone call. (Defendant objected at trial).

(d) Plain error was committed when defendant's character witnesses were cross examined by state concerning a remote conviction and an alleged arrest for carnal abuse, totally unrelated with the trait in issue, as well as in the form of the questions propounded. (Not objected to at trial. Plain error rule invoked).

(e) Trial judge's charge on defendant's failure to take stand was error. (Raised by defendant's Request to Charge).

(f) The Court erred in denying defendant's motion for judgment of acquittal at end of State's case and at the close of the entire case. (No objection necessary).

(g) The defendant was denied a fair and impartial trial by jury when trial court would not allow defendant to interrogate witnesses to determine where crime was committed. (Objection made at trial).

(h) Remarks of prosecutor in his summation were so highly improper and prejudicial as to constitute reversible error. (No objection made. Plain error rule invoked).

(i) The trial court's charge to the jury contained additional errors of law which constitute reversible error, to wit:

1. The court's charge concerning "flight." (Not objected to).

2. The court's charge read in its entirety is ambiguous and confusing. (No exception taken. Plain error rule invoked).

3. The court's charge defining an "inference." (No exception taken. Plain error rule invoked).

4. The court's charge defining "bookmaking." (Raised by defendant's Request to Charge).

5. The court's charge concerning "prior conviction of crime." (No exception taken. Plain error rule invoked).

(j) The court's refusal to permit defendant to question witnesses concerning illegal search, seizure and arrest. (Raised by objection).

(k) Perjury by principal state's witnesses. (Presented to all courts).

The basic argument of the petitioner before the Appellate Division of the Superior Court of New Jersey was that he was denied a fair trial. Said court disposed of it by stating:

> "A melange of alleged trial errors none of which was brought to the attention of the trial court is offered in support of the argument. This argument is unimpressive to say the least."

Said court erred in its disposition of so vital an allegation.

As to the individual points raised by defendant in his Brief and Supplemental Brief for Appellant, the said Appellate Division of the Superior Court of New Jersey failed to dispose of the following Points in violation of Rule 2:9-1(a) which required that it prepare and file an opinion of the reasons for its decision, to wit:

(a) The Court erred in denying defendant's motion for judgment of acquittal at end of State's case and at the close of the entire case.

(b) The defendant was denied a fair and impartial trial by jury.

(c) The Court's charge concerning "flight."

(d) The Court's charge defining an "inference."

(e) The Court's charge defining "bookmaking."

(f) The Court's charge concerning prior conviction of crime.

(g) Perjury by principal state's witnesses.

Upon affirmance of said judgments of conviction by said Appellate Division of the Superior Court of New Jersey the defendant filed his appeal to the Supreme Court of New Jersey and made a motion to said Appellate Division to be admitted to bail pending his said appeal. Said Appellate Division continued the defendant in bail to enable him to make his application for continuance in bail to the Supreme Court. Petitioner made such application pursuant thereto and on June 28, 1960, the Supreme Court of New Jersey continued petitioner in bail pending the disposition of his Petition for Certification, which was filed by him with the Supreme Court of New Jersey along with his Notice of Appeal.

In both Appeal and Petition for Certification by the Supreme Court of New Jersey the petitioner set forth the same errors, grounds and arguments advanced by him before the Appellate Division of the Superior Court of New Jersey.

On November 14, 1960, the Supreme Court of New Jersey, without oral argument, dismissed petitioner's Appeal and denied his Petition for Certification, without oral or written reason (or opinion) for its action.

Petitioner immediately made a motion to the Supreme Court of New Jersey that he be admitted to bail pending his prosecution of a Petition for Writ of Certiorari to the Supreme Court of the United States. On November 28, 1960 said Supreme Court of New Jersey entered an order continuing petitioner in bail for 30 days to enable the petitioner to file his Petition for Writ of Certiorari and Motion to this court to be admitted to bail pending prosecution for Writ of Certiorari.

Reasons Relied on for the Allowance of the Writ.

(Italics and emphasis ours unless otherwise indicated.)

1. A conviction based on false and perjured testimony and perjured testimony in a State Court is a denial of due process within the Fourteenth Amendment of the Constitution of the United States and should be set aside by this Court.

Two of the state's principal witnesses, Detective-Sergeant Matthew W. Kraft and George Gottesman, committed perjury at the trial of the causes wherein the petitioner was convicted.

One of the most important phases of these cases evolves around a telephone call allegedly made by one George Gottesman to the defendant's place of business. This call was allegedly received by Detective-Sergeant Matthew W. Kraft, a member of the State Police assigned at that time to the Essex County Prosecutor's Office. Testimony con-

cerning the contents of the telephone conversation was introduced into evidence over defendant's objections (D75a-33 to D76a-10). *Detective-Sergeant Kraft testified* that he received the call from a person who identified himself as George Gottesman (D75a-22 to D76a-31) and testified to the contents of the conversation. He further testified *that he did not know George Gottesman prior to the telephone call* being received by him (D84a-16 to 25). *George Gottesman testified* on behalf of the State that he did make the aforesaid telephone call and testified to his version of the conversation had at that time (D92a-14 to D93a-10). He also testified *that he did not know Detective-Sergeant Kraft* (D97a-1 to 10).

On April 27, 1960, a hearing was held by the Board of Public Utilities Commissioners. George Gottesman testified under oath concerning the very same telephone call with which we are concerned. *Mr. Gottesman testified thereat that he knew Detective-Sergeant Kraft and has so known him for about 4 or 5 years.* This of course was in direct conflict with his previous testimony in the trial of these causes *wherein he said he did not know Detective-Sergeant Kraft* (D97a-1 to 10). He also testified concerning the conversation had in said telephone call, *which testimony was not the same* as that given in the trial court (D92a to D96a).

A reading of Gottesman's testimony in Appendix F proves beyond any doubt that Gottesman is a flagrant perjurer and that both Gottesman and Kraft DID KNOW each other before the date of the alleged telephone call and that both committed perjury when they testified at the trial below that they DID NOT KNOW each other prior thereto.

The perjury alluded to was brought to the attention of the Prosecutor, the trial court, the Appellate Division of the Superior Court and the Supreme Court of New Jersey, the court of last resort of said state. The perjury consisted of salient, material and relevant subject matter, without which there could not have been a conviction on either indictment.

It was contended by the petitioner from the very inception of the mention of the telephone call that it was spurious. The contention of spuriousness was maintained throughout the trial and whether Kraft and Gottesman knew each other before the telephone call was of monumental importance. The Prosecutor demonstrated its importance by stressing it in his summation. The trial court in its charge attached great importance to it. The petitioner requested and the trial court charged his Request To Charge on the law concerning spuriousness of telephone calls.

After the trial, defendant hired a private detective who investigated and found that the two witnesses *did know each other* before the telephone call. The petitioner's attorney presented the facts to the Prosecutor before sentence and requested the Prosecutor to make inquiry and present the facts to the Grand Jury and the trial court. The Prosecutor refused.

On day of sentence petitioner's attorney made a motion and plea in his behalf (prior to sentence) to the trial court in which he informed the trial court of the perjury. The trial court refused and failed to act in any fashion.

Disappointed but not defeated because of his lack of subpoena and other investigative powers, the petitioner

contrived a way to get Gottesman on the stand and under oath. He caused to be filed a petition for telephone service restoration before the Public Utility Commission of New Jersey, whereat the petitioner, in good fortune, was able to prove by sworn testimony that both Kraft and Gottesman testified falsely in the trial of the causes.

The matter was brought to the immediate attention of the Appellate Division of the Superior Court where the matter was then lodged on appeal from the trial court. It was done formally by "Motion to Set Aside Judgments of Conviction, etc." (Appendix B), and the filing with said court of Public Utility Commission transcript of testimony of Gottesman (Appendix F). In this motion the perjury charge was presented to the court head on. The motion petitioned the court to set aside the judgments of conviction; to enter judgments of acquittal; to exercise original jurisdiction; to retain jurisdiction and remand the matter of the alleged perjury to the trial court for investigation and report; and to retain jurisdiction and remand the matter to the trial court for resolution of motion to set aside convictions and for entry of judgments of acquittal.

The relief sought covered any one of several manners by which said court could have proceeded. With inconsistency of action said court denied the motion. There was no opinion, oral or written, given or filed. There was no hearing. There was no testimony. There were no findings of fact or law. There was no denial of the perjury by the Prosecutor. In spite thereof the Court ignored the charge of perjury in full and failed to act, or even mention the perjury.

Thereafter the defendant filed an Appeal to and a Petition for Certification by the Supreme Court of New Jersey (last resort).

In Point Five of Brief for Appellant and in Point Five of Petition for Certification aforementioned the petitioner specifically avers that "no conviction can stand up on perjured testimony" and argued the point at length

The Supreme Court of New Jersey dismissed the petitioner's Appeal and denied his Petition for Certification without the petitioner or his attorney ever being heard and without oral or written opinion (or reason) for its action. It may be presumed that under the rules because there was no split vote in the judgment of affirmance of the Appellate Division the petitioner had no right of appeal because it "concluded" there was no constitutional question involved and did therefore dismiss the appeal, and that under its discretionary powers it refused certification because it felt there was no constitutional question raised and the Appellate Division had not decided any question of substance theretofore determined by it. It is to be noted that the Supreme Court of New Jersey was apprised of the perjury and did not order hearings, did not take testimony, did not make findings and failed to act in any regard to safeguard the constitutional rights of your petitioner to a fair trial and due process of law as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States.

Throughout the trial the petitioner challenged the genuineness of the telephone call and alleged it to be spurious. The trial court was duty bound to make inquiry and thereupon a determination as to whether the contents of the telephone call were to be allowed in evidence, and then

only if the circumstances rebutted every suspicion that the call may have been spurious. The trial court failed to do so and transferred the duty of making such a determination to the jury. Be that as it may, judge or jury was called upon to weigh the testimony before it and determine whether or not the call was counterfeit. In making such a determination, the most important and necessary fact was whether the person making the call and the person receiving the call DID OR DID NOT KNOW EACH OTHER. The Prosecutor was aware of this as was amply demonstrated by him in his attempt to rebut suspicion that the telephone call was spurious when he asked George Gottesman on re-direct examination if he knew any of the detectives. In his answer thereto George Gottesman said, No, sir (D96a-24 to 10). Defense counsel in pursuit of his knowledge of spuriousness pinpointed the matter by asking George Gottesman if he knew Detective-Sergeant Kraft, and again Gottesman answered "No, sir (D97a-1 to 10); and then conversely by asking Kraft if he knew Gottesman before the telephone call was made and Kraft answering that he did not know Gottesman (D84a-18). It goes without saying that it is very unlikely that two persons who DO NOT KNOW each other will counterfeit a telephone call. They must know each other in order to plant or counterfeit the telephone call. That is why the question of whether Gottesman knew Kraft and Kraft knew Gottesman before the telephone call was allegedly made is of such prime, major and monumental importance; and that is why the lie told by each at the trial is of such material and relevant importance. That is why the Prosecutor asked the question of Gottesman—to put into evidence his denial for the sole purpose of gilding the lily and attaching to the telephone incident the cloak of

authenticity, genuineness and credibility. That it paid dividends is evidenced by the admission of the telephone call contents in evidence and the conviction of the petitioner below.

Had Gottesman and Kraft told the truth in the trial court the petitioner could have elicited from Gottesman (and probably from Kraft) the kind of information and testimony Gottesman gave before the Public Utility Commission. That being so, the course of events below would have been different because a mere reading of the Public Utility Commission testimony leads the reader to but one conclusion and that is that *he is not telling the truth*, that he is a *perjurer*, and that he lied in the trial court not only about not knowing Kraft but about his entire testimony. Mention should be made that when Gottesman testified in the trial court Kraft was in the court room, as he was throughout the trial below, and that Kraft had knowledge of the perjury by Gottesman, as well as his own perjury.

It is commended to the court that the judgments of conviction below were based on false or perjured testimony that the perjury was committed by the police officer (Kraft) in charge of the arresting officers and by a principal state's witness with the knowledge of said Kraft who was a representative of the State; that the perjury was relevant to the case; that the state representative (Kraft) sat in silence while Gottesman gave the false testimony which involved and concerned his; that the Prosecutor failed to correct the testimony of Kraft and Gottesman after the trial when it was reported to him; that Mr. Combs, after conferring with the Prosecutor, was supplied with the record abstract of the trial, and he fought strenuously to prevent and conceal

the testimony of Gottes nan; and that none of the courts in New Jersey saw fit to afford your petitioner a corrective judicial process to remedy the wrong complained of, thereby causing the petitioner to have his constitutional rights impaired, denying unto him a fair trail and due process of law guaranteed to him by the Fourteenth Amendment of the Constitution of the United States.

These judgments of conviction should be set aside, and the Writ of Certiorari should be allowed.

In support of petitioner's argument there is commended to the court cases decided by this court which are favorable to the petitioner and dispositive of his legal contentions.

In *United States ex rel. Almeida* v. *Baldi et al.*, 195 F. 2d 815 (1952), this court held that where the Supreme Court of Pennsylvania took no testimony and made no findings, the allegations of petitioner in habeas corpus proceedings in the Federal District Court that vital evidence was wilfully concealed in criminal prosecution of petitioner, were required to be taken as true.

In the case at bar there was no hearing, no testimony taken and no findings made by any of the courts, including the Supreme Court of New Jersey. There never was a denial made that perjury was committed. Your petitioner's allegations are therefore required to be taken as true in this Petition for a Writ of Certiorari.

In the case of *Mooney* v. *Holohan*, 294 U. S. 103, 55 S. Ct. 340 (1955), the court opined that a conviction based on perjured testimony in a state court is a denial of due process within the purview of the Fourteenth Amendment of the Constitution of the United States.

In denying the Attorney General's specious argument on petitioner's contention, the court stated (page 112):

> "That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. Herbert *v.* Louisiana, 272 U. S. 312, 316, 317. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction thro..gh the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as consistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the act of prosecuting officers on behalf of the State, like that of administrative officers in execution of the laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' Carter *v.* Texas, 177 U. S. 442, 447; Rogers *v.* Alabama, 192 U. S. 226, 231; Chicago, Burlington & Quincy R. Co. *v.* Chicago, 166 U. S. 226, 223, 234." See also: *Jones* v. *Commonwealth of Kentucky*, 97 F. 2d 335 (1938), post.

The case of *Jones* v. *Commonwealth of Kentucky*, 97 F. 2d 335 (1938), reaffirms *Mooney* v. *Holohan*, *supra*, and then goes on to say at page 338:

> "If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the deline-

ated requirement of due process in the Mooney case embraces no more than the facts of that case require, and that 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired.

"(7) *The judicial processes of the state have here been vainly invoked.* The court below stayed its hand until they had been given full opportunity to function. Even then it was thought wiser to have the clearly indicated relief sanctioned by a three judge reviewing court than to have responsibility for setting aside a state court judgment assumed by a single judge of an inferior Federal court. Considerations of delicacy and propriety need no longer deter ameliorations. The appellant is not to be sacrificed upon the altar of a formal legalism too literally applied when those who from the beginning sought his life in effect confess error, when impairment of constitutional rights may be perceived, and the door to clemency is closed."

The order dismissing the writ of habeas corpus was set aside and the cause remanded.

In *Pyle* v. *Kansas et al.*, 317 U. S. 213, 63 S. Ct. 177 (1942), the court stated:

"Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evi-

dence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U. S. 103."

In *Mesarosh* v. *United States*, 352 U. S. 1, 77 S. Ct. 1 (1956), in reversing judgments below, the court held that the dignity of the United States government would not permit the conviction of any person on tainted testimony. There was a dissent in this case predicated on appropriate procedure suggested by the majority in which all dissenters agreed with Justice J. Harlan who stated:

"We do not, of course, even remotely imply that we give any tolerance to the notion that a criminal conviction found to be infected by tainted testimony should be allowed to stand."

In *Alcorta* v. *Texas*, 355 U. S. 28, 78 S. Ct. 103 (1957), the state's principal witness issued a sworn statement in which he declared that he had given false testimony at the trial. Relying thereon, the petitioner contended that he had been denied a fair trial in violation of State and Federal Constitutions. This court granted certiorari, 353 U. S. 972, and reversed the judgment of conviction, holding that the petitioner was not accorded due process of law.

In *Napue* v. *Illinois*, 360 U. S. 264, 79 S. Ct. 1173 (1959), the facts reported at page 265 are as follows:

"At the murder trial of petitioner the principal state witness, then serving a 199 year sentence for the same murder, testified in response to a question by the Assistant State's Attorney that he had received no promise of consideration in return for his testimony.

The Assistant State's Attorney had in fact promised him consideration, but did nothing to correct the witness' false testimony. The jury was apprised, however, that a public defender had promised 'to do what he could' for the witness. The question presented is whether in these facts the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied the petitioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

This court earlier granted certiorari (358 U. S. 919) to consider the question posed in the first paragraph of its opinion to wit at page 269:

"FIRST, it is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney *v.* Holohan, 294 U. S. 103; Pyle *v.* Kansas, 317 U. S. 213; Curran *v.* Delaware, 259 F. 2d 707. See New York ex rel. Whitman *v.* Wilson, 318 U. S. 688, and White *v.* Ragen, 324 U. S. 760. Compare Jones *v.* Commonwealth, 97 F. 2d 335, 338, with In re Sawyer's Petition, 229 F. 2d 805, 809. Cf. Mesarosh *v.* United States, 352 U. S. 1. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta *v.* Texas, 355, U. S. 28; United States ex rel. Thompson *v.* Dye, 221 F. 2d 763; United States ex rel. Almeida *v.* Baldi, 195 F. 2d 815; United States ex rel. Montgomery *v.* Ragen, 86 F. Supp. 382. See generally annotation, 2 L. Ed. 2d 1575.

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because *the false testimony goes only to the credibility of the witness.* The jury's estimate of the truthfulness and reliability

of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." As stated by the New York Court of Appeals in a case very similar to this one, People *v.* Sarrides, 1 N. Y. 2d 554, 557; 136 N. E. 2d 853, 854-855; 154 N. Y. S. 2d 885, 887:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth * * *. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair!" "

2. The petitioner was not afforded a fair trial within the purview of the Fourteenth Amendment of the Constitution of the United States when the Trial Court (a) over objection dispensed with the requirement of proof as to where the crime was committed; (b) refused to permit petitioner to cross examine witnesses in that regard; (c) refused to permit the petitioner to ascertain whether the crime was committed in New Jersey or some other sovereign state; (d) threatened petitioner's attorney with legally disastrous consequences if he argued the point before the jury; (e) determined without inquiry that the crime was committed in the State of New Jersey; and (f) abridged the petitioner's right to a trial by jury.

The New Jersey Constitution of 1947, Article 1, Paragraph 9, provides in part as follows:

> "The right of trial by jury shall remain inviolate. * * *"

The Sixth Amendment of the Constitution of the United States provides in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * *"

Petitioner is aware that this Court has heretofore ruled that the first Eight Amendments to the United States Constitution do not apply to the individual states (*Adamson* v. *California*, 1956, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903), but Petitioner respectfully suggests to this Court that the time has now come to re-appraise the majority ruling in said case and adopt the contrary view of the four dissenting justices in said case.

Petitioner is further aware that this Court has heretofore ruled that under the due process clause one may not claim a right to trial by jury. *Doheny* v. *Rogers*, 281 U. S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A. L. R. 434 (1930). However, when a State does guarantee a trial by jury as a matter of right, such trial by jury shall be granted and shall be a full and complete trial by jury unabridged by the trial court and with no usurpation by the trial court of the fact finding province of the jury. Cf. *Griffen* v. *State of Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A. L. R. 2d 1055. Questions of fact are to be determined by the jury from the evidence in accordance with instructions from the trial judge; and the court shall not assume, directly or indirectly, to take from the jury this prerogative. As part of the proofs in Petitioner's cases, it was incumbent upon the State of New Jersey to prove not only that acts prohibited by N. J. S. 2A:112-3 had been committed by the Petitioner but also that those acts were com-

mitted within the territorial limits of New Jersey. For it goes without saying, that an act or acts, to be criminal, must be alleged to be an offense against the sovereignty of the government (in this case the government of New Jersey). This is of the very essence of crime punishable by human law. The act or acts must be done within the territorial confines of that government, for how can an act done within the territorial confines of one sovereignty be an offense against the sovereignty of another. All the cases turn upon the question of where the act was done. There cannot be two state sovereignties supreme over the same place at the same time and over the same subject matter. The existence of one state sovereignty is exclusive of the other state sovereignty. New Jersey, as every other state in these United States, must necessarily stop at the boundary of another state in exercising acts of sovereignty. The allegation of an act or acts done in another sovereignty, to be a violation of New Jersey sovereignty, is simply alleging an impossibility, and all laws to punish such acts are necessarily void. Conversely, a lack of proof that the act or acts complained of were done within the territorial limits of New Jersey, or for the State to dispense with proof thereof, renders any judgment of conviction thereon a nullity and any punishment meted out on account of said judgment is necessarily void.

Now then, the indictments in this case allege that the defendant did certain acts in the City of Orange, Essex County, New Jersey, in violation of N. J. S. 2A:112-3, and against the peace of the State of New Jersey, the government and dignity of the same. The allegations of the said indictments must be proven to the jury and if the trial court dispenses with the requirement of proof as to where

the acts were committed and takes away from the jury its prerogative to decide whether or not the acts complained of were or were not committed within the territorial confines of the State of New Jersey, there is a denial of the absolute right to trial by jury and a denial of due process of law.

What then did the trial court do in the instant cases which deprived the petitioner of a fair and impartial trial by jury and of due process of law? First, it dispensed with proof of "*where* the crime was committed," which in and of itself is a denial of due process. Second, it said in the presence of the jury that it did not make any difference *where* the alleged recordation of bets was made. Third, the trial court would not permit defense counsel to cross examine any of the State's witnesses concerning *where* the alleged crime was committed or *where* any of the acts constituting the crime were done. Lastly, he forbade defense counsel to argue to the jury the question of *where* the crime, or acts constituting the crime, if any, were committed and threatened defense counsel that if he did so argue he would instruct the jury that there could be no question as "to *where* the crime was committed" and further, that he would permit the prosecutor to argue to the jury "that the defendant was arrested in Orange; a complaint was made in Orange, the Grand Jury of this County (Essex) returned an indictment charging him * * *", all of which is inadmissible evidence in the trial of a criminal case in the State of New Jersey.

In view of the foregoing actions, statements, rulings and threats (all of which are substantiated in Statement of the Case) it is respectfully urged that the Petitioner was

deprived of a fair and impartial trial and was denied due process of law when he was not permitted to determine by interrogation of witnesses where the alleged crimes were committed.

3. The petitioner was not afforded a fair trial within the purview of the Fourteenth Amendment of the Constitution of the United States when the trial court and prosecutor commented on his failure to take the stand.

At the trial of the cases herein, the defendant did not take the stand. The prosecutor in his summation pointed out and emphasized to the jury that the defendant did not take the stand and said:

> "The defendant didn't take the witness stand. He didn't take the witness stand. I can't compel him to take the witness stand. Nobody can compel him to take the witness stand but he has the right to take the witness stand regardless of anything to tell you, ladies and gentlemen, whether or not that instrument, 12a, found in his book, the little green book, was what he had bet and that it was not as Detective DeStefano and Detective Kenny said, the regarding of bets made to a book maker.
>
> There is no evidence in this case at all that this was written by him but he has it in his possession and from that you have a right to infer that he could not deny truthfully that that was his book."

Thereafter, the court charged the jury that the defendant did not take the witness stand in his own defense; that he was competent to testify; that he had a right to testify; that his failure to testify raised the permissible inference that he could not deny the following facts, which tended *to prove his guilt,* to wit:

(1) the testimony of the officers that the defendant had on his person a sheet on which there were recorded alleged horse race bets;

(2) the testimony of the officers as to the attempted flight of the defendant;

(3) the testimony of the officer as to what occurred in the rear room at the table in the defendant's presence;

(4) the testimony of the officers as to their finding an Armstrong sheet on this table and a Morning Telegraph in the defendant's place of business; and

(5) the testimony of the officer as to the use of the telephone in the defendant's place of business.

Petitioner is aware that this Court found no constitutional infringement as a result thereof, in the cases of *Twining* v. *New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 and *Adamson* v. *California*, *supra* (5 to 5 decision). The majority holding was predicated upon the ruling that the Fifth Amendment was not applicable to the States by virtue of the Fourteenth Amendment. However, the holding of those two cases requires review and re-appraisement. The facts of this case amply demonstrate the reasons therefor.

It is respectfully urged that the views expressed by the four dissenting justices in the *Adamson* case be adopted and made the Supreme Law of this land.

4. The petitioner was not afforded a fair trial and was denied due process of law inasmuch as the trial was so replete with errors as to be tantamount to no trial or hearing at all.

Everyone charged with crime has an absolute constitutional right to a fair trial in an atmosphere of judicial

calm, before an impartial judge who shall conduct the trial in accord with the settled course of judicial proceedings established by the State. The trial judge must follow the forms of law appropriate to the case and just to the petitioner, all of which should be in accord with those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of the rights and liberty of persons charged with crime. The sound administration of criminal justice in our democracy requires that both the end and the means be just. The accused, no matter how abhorrent the offense charged nor how seemingly evident the guilt, is entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty in English speaking countries. And where legal errors are of such a magnitude as to prejudice the defendant's rights, or, in their aggregate have rendered the trial unfair, then fundamental constitutional concepts dictate the granting of a new trial.

In the case *sub judice,* the trial court deviated from the regular course of judicial proceedings and committed, or permitted to be committed, the following errors, the aggregate of which petitioner contends denied him a fair trial.

(a) *Trial court erred in ordering that both indictments be tried together.*

Petitioner was charged in indictment No. 1668 with *bookmaking* on *March 20, 1959* and he was charged in indictment No. 1669 with *keeping a gambling resort* on *March 21, 1959.* Although the indictments charged separate and distinct offenses, each of which was complete in

itself, each of which was independent of each other and not provable by the same evidence and each of which occurred on different days (no allegation on the part of the State that they were part of the same transaction nor did the proofs so disclose), the trial court ordered both cases consolidated for trial, without the consent of the petitioner. The consolidation was ordered in spite of N. J. Rule of Criminal Practice 3:5-7 which is substantially the same as Federal Rule of Criminal Procedure 14 in that it provides that separate trials may be granted if the defendant is prejudiced by a consolidation.

Throughout the trial the prosecutor and the trial judge found themselves using the evidence as "floating evidence", that is, using the evidence in support of Bookmaking to plug up deficiencies in the Keeping of a Gambling Resort charge, and vice versa. At no time during the trial, or in its charge to the jury, did the trial judge attempt to separate the evidence and properly allocate it for the jury so that the jury could apply the proper evidence to the proper indictment nor did the trial judge admonish the jury that it was not to take into consideration any proof of one crime and apply it by inference or otherwise to the other crime. As was said in *Kotteakos* v. *U. S.*, 328 U. S. 750, 66 S. Ct. 1239 (1946):

> "• • • in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law. • • •"

The consolidation substantially prejudiced the petitioner's rights. It held the defendant out to be an habitual criminal. This is especially true in view of the fact that in the cross examination of petitioner's character witnesses,

the state brought out that petitioner had theretofore been convicted of receiving stolen goods and further posed a question concerning an alleged arrest of the petitioner for carnal abuse of which this petitioner has no knowledge. In addition thereto, the prosecutor referred to a "criminal record" of the petitioner in his summation and the trial judge charged the jury concerning the "prior conviction of crime of this defendant."

The consolidation further prejudiced the substantial rights of this petitioner in that he was confounded in his defense, he was required to be on constant guard in attempting to prevent evidence affecting one crime from transference to the other crime by psychological effect, if by no other medium. The consolidation was a tremendous distraction to the jury and the trial court did not in anywise charge and admonish the jury concerning the two offenses.

There must be a *nexus* between the two transactions charged against this petitioner, because the proof of the distinct transactions blended to the prejudice of this petitioner. The evidence concerning these two separate and distinct crimes was not in any proper sense of the word evidence concerning the same series of acts or transactions constituting an offense. The danger of transference of evidence from one case to the other, subconsciously or otherwise, is so great that no one can really say prejudice to substantial rights has not taken place.

It is therefore respectfully urged that the consolidation was a denial of a fair trial, thereby offending the edict of the due process of law clause of the Fourteenth Amend-

ment of the Constitution of the United States. The reasoning contained in *McElroy* v. *United States*, 164 U. S. 76, 17 S. Ct. 31, 41 L. Ed. 355 (1896), and in *Kotteakos* v. *U. S.*, *supra*, is applicable to the facts of this case as well as the dissenting opinion of this court in *Schaffer* v. *U. S.*, 362 U. S. 516, 80 S. Ct. 945, 4 L. Ed. 925 (1960).

(b) *Trial court erroneously defined crime of "bookmaking" by omitting a necessary ingredient of the crime.*

In its charge to the jury the trial court defined bookmaking as

> "The making of a book of bets, that is, the making or taking OR recording or registering of bets or wagers on races or kindred contests • • •."

The defendant by his request to charge No. 8 sought to have the trial court charge the jury the correct law, to wit:

> "Bookmaking • • • meant the making or taking *and* recording or registering of bets or wagers on races and kindred contests • • •".

There is no question that in the State of New Jersey bookmaking comprises two operations, to wit,

(1) the making or taking of a bet, *and*

(2) the recording or registering of a bet.

It is therefore clear that the trial judge grievously erred in using the disjunctive "OR" instead of the conjuctive "AND". Reading the trial judge's charge in its entirety, it is clear that it in effect instructed the jury that the mere

recordation of bets was sufficient to justify a conviction and that it was unnecessary for the state to prove that a bet had been made or taken by the defendant on the date alleged in the indictment. A person cannot be punished on a judgment founded upon an incorrect definition of the crime itself for to do so would be to injuriously affect the fundamental and substantial rights of a citizen to be protected against the deprivation of liberty without due process of law.

(c) *Plain and substantial error was committed when petitioner's character witnesses were cross examined by State concerning a remote conviction and an alleged arrest for carnal abuse, totally unrelated to the trait in issue.*

The form and substance of the cross examination of petitioner's character witnesses was plain and prejudicial error which was harmful to the substantial rights of the petitioner. The recognized and settled course of judicial proceedings established in the State of New Jersey for determining whether to allow cross examination of character witnesses is for the trial judge to conduct a preliminary inquiry out of the presence of the jury to satisfy himself.

(1) that there is no question as to the fact of the subject matter of the rumor, that is, of the previous arrest, conviction, or other pertinent misconduct of the defendant;

(2) that a reasonable likelihood exists that the previous arrest, conviction or other pertinent misconduct would have been bruited about the neighborhood or community prior to the alleged commission of the offense on trial;

(3) that neither the event or conduct nor the rumor concerning it occurred at a time too remote from the present offense:

(4) that the earlier event or misconduct and the rumor concerned the specific trait involved in the offense for which the accused is on trial; and

(5) that the examination will be conducted in the proper form, that is, "Have you *heard*, etc.," not "*do you know*, etc."

And if the conclusion is reached to allow the interrogation, the jury should be informed of its exact purpose either at the conclusion thereof or in the charge. See *State* v. *Steensen*, 35 N. J. Super. 103, 113 A. 2d 203 (App. Div. 1955).

The trial court in this case did not conduct a preliminary examination and satisfy itself as set forth above. The prosecutor framed the form of his question as "*do you know*" instead of "*have you heard.*" The offense of receiving stolen goods had happened 21 years prior thereto and was too remote. The trial court *did not* either at the conclusion of the interrogation or in his charge inform the jury of the purpose of the cross examination. In the cross examination of the second character witness, the Prosecutor asked the following question:

"Q. Doctor, *have you heard* he was *arrested* on June 18, 1936 for carnal abuse?"

The question was asked by the prosecutor even though he admitted he was familiar with the *Steensen* case and even alluded to it. The question violated the *Steensen* case four

square. It violated every established rule of law and then and there "convicted" the defendant.

This bombshell was exploded in the court room for one purpose, and one purpose only, and one does not have to be a lawyer to understand its obvious intent. It must be concluded that the purpose of the prosecutor was not to test the credibility of the character witness, but to bring before the jury proof of commission of other crime, regardless of whether it was or was not this defendant and regardless of whether he was or was not convicted of the charge. In this instance it was the crime of "carnal abuse", the trait of which is certainly not similar with the trait in issue for the offenses for which the petitioner stood charged at bar. The malintention of use by the prosecutor is indicated by this reference thereto in his summation, to wit:

> "During the course of the cross examination of one of the character witnesses produced by the defendant it was brought out the defendant had a *criminal record.*"

In his charge to the jury, the trial judge gave a charge concerning prior conviction of crime which is usually given when a defendant takes the stand and his prior record is *disclosed to affect his credibility.* The defendant did not take the stand and therefore said charge should not have been given. Instead the trial judge should have informed the jury of the exact purpose of the cross examination of the character witnesses, to wit, that the cross examination is sanctioned as a test of the witness' credibility solely, the theory being that if he had heard such disparaging *rumors*

his standards as to what constitutes good repute may not be sound or he lacks good faith, or that if he has not heard the rumors (which did in fact circulate) then he is not actually familiar with the defendant's reputation. The court should have emphasized that any such cross examination was not proof of any crime or arrest ever having taken place but was simply a rumor that it had so taken place and if any juror inferred that the rumors were true it was not to enter into any phase of the considerations as to whether the defendant was guilty of the crime for which he was on trial. The trial judge in his charge totally ignored the highly improper and prejudicial question asked by the prosecutor concerning a supposed arrest of this defendant on a charge of carnal abuse, a question which universally brings a mistrial when propounded.

(d) *Remarks of prosecutor in his summation were highly improper and prejudicial.*

Public prosecutors must not only be zealous in enforcing the law, but they must also consistently refrain from any conduct that is lacking in fair play. Comments by public prosecutors upon matters outside the evidence are highly improper. The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done.

In petitioner's case, the prosecutor, in summation said:

> "You have a right to draw on your own experiences to determine whether or not that sometimes these bookmakers even run charge accounts and take these calls over the telephone, and, 'I will take your bet and if you win I will pay you when you come in. If you lose you pay me. You will pay me anyway.'

> This is against the law of our State—bookmaking. We have the tracks where we can go if we want to go to a horse race and you can bet your silly heads off down there at a track if you want to do it. *Now, who gets paid for that? The State of New Jersey. You and I and his Honor get something out of that but what do you get out of a bookmaker? Nothing. Nothing. He doesn't pay income taxes on it.*"

Certainly in doing so he was commenting upon matters outside of the evidence with the obvious intent of prejudicing the defendant. In his summation to the jury he referred to the defendant's criminal record and his failure to take the stand. In his cross examination of the character witnesses he injected "carnal abuse" into the trial knowing full well that an obligation rested on him to display a very high degree of good faith in embarking upon said cross examination of the character witness. All in all he transcended the limits of restraint placed upon him by law and violated the essentials of fair play thereby causing irreparable, substantial and grievous harm and prejudice to the rights of the petitioner.

(c) *The trial court erred in its charge concerning flight.*

The Court charged concerning flight that "if unexplained the flight of a defendant after the commission of a deed is a circumstance tending to prove consciousness of guilt." This certainly is not the law of New Jersey. Court should have charged that "unexplained flight is *merely* a circumstance which *may* tend to show consciousness of guilt and which should be weighed by jury with all other facts and circumstances." See: *State* v. *D'Amato*, 26 N. J. Super. 185, 97 A. 2d 741 (App. Div. 1953).

(f) *The Appellate Division of the Superior Court of New Jersey abridged petitioner's right of appeal in failing to dispose of all the points raised by the petitioner and in failing to give the reasons for its decision.*

The right of appeal in a criminal case is a matter of right in the State of New Jersey. It is part of the process of law under which this petitioner presently stands convicted of the crimes charged. *Frank* v. *Mangum*, 237 U. S. 309 (1915).

Appellate Review is governed in part by Rule of Practice 2:9-1(a) which requires the Appellate Division to prepare and file an opinion of the reasons for its decision. While the said Appellate Division did prepare and file an opinion in purported compliance with said rule, it failed to dispose of the following points raised by petitioner in his Brief and Supplemental Brief to that Court:

(a) The Trial Court erred in denying defendant's motion for judgment of acquittal at end of State's case and at the close of the entire case.

(b) The defendant was denied a fair and impartial trial by jury.

(c) The Court's charge concerning "flight."

(d) The Court's charge defining an "inference."

(e) The Court's charge defining "bookmaking."

(f) The Court's charge concerning prior conviction of crime.

(g) Perjury by principal state's witnesses.

The basic argument of the petitioner before the Appellate Division of the Superior Court of New Jersey was that he was denied a fair trial. Said court disposed of it by stating:

> "A melange of alleged trial errors none of which was brought to the attention of the trial court is offered in support of the argument. This argument is unimpressive to say the least."

Said court erred in its disposition of so vital an allegation and failed to adhere to the rule of the court.

A review by an Appellate Court which fails to dispose of the arguments raised therein is tantamount to no review at all. In line with that thought, there is commended to the court the case of *Griffen* v. *State of Illinois*, *supra*, for comparison.

It is respectfully submitted that the foregoing errors together with the perjury, the trial judges rulings, actions, prohibitions and threats concerning "where the crime was committed," and the comments by the trial court and prosecutor on defendant's failure to take the stand, in their aggregate, if not any one specifically, rendered the trial unfair and was a denial of due process within the purview of the Fourteenth Amendment of the United States Constitution.

Conclusion.

It is therefore respectfully submitted that the Petition for a Writ of Certiorari to the Supreme Court of New Jersey be granted.

Respectfully submitted,

FRANK A. PALMIERI,
Attorney for Petitioner,
327 Main Street,
Orange, New Jersey.

Verification.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss.:

Daniel Cecere being duly sworn according to law upon his oath deposes and says:

1. I am the petitioner in the within cause.

2. I have read the foregoing facts and I know them to be true of my own personal knowledge.

Daniel Cecere

DANIEL CECERE.

Sworn and subscribed to before me this 20th day of December, 1960.

Mildred E. Mariani

MILDRED E. MARIANI,
A Notary Public of New Jersey.
My Commission Expires December 5, 1961.

APPENDIX A.

Motion and Plea on Behalf of Defendant.

Newark, New Jersey,
Wednesday, January 6, 1960.

Before:

HONORABLE JAMES R. GIULIANO, *J. C. C.*

(Appearances as before.)

(2) Mr. Palmieri: If your Honor please, I have been substituted for Mr. Raymond Connell as attorney for the defendant in this case several weeks ago. At the time of my engagement my sole function, as I reported to your Honor at the time of your signing of substitution, was to represent this defendant at the time until the time of sentencing, and that my sole function was to review the transcript of the trial to determine whether or not there was or was not any error in my opinion which would warrant an appeal of that conviction. Coupled with that, I have a secondary duty, of course, of making a plea on the behalf of this defendant today upon sentence.

I stand before your Honor that in my humble opinion it appears to me that this conviction is one which I deferentially don't believe would stand on appeal. This is not a motion for a new trial nor is it the argument of an appeal before an appellate tribunal but I do think, if your Honor please, that in the discussion of sentence perhaps there is a difference between perhaps a heavy (3) case and a light case, a thin one or one not so thin. I think that I should like to make mention of several things that happened in that trial which are meritorious of consideration by the Court this morning in reaching its conclusion and as to what it shall or shall not do in this case.

I do not believe, if your Honor please, that a charge of bookmaking was ever proved in the one indictment. The

record is barren that a bet was ever placed or that a bet was ever received or that a bet of any kind was ever consummated on March 20th—that's the earlier date, the date before the raid or the arrest. Apparently that bookmaking conviction was predicated on a sheet or sheets of paper that were found in the possession of this defendant on the 21st, never proved to have been in his handwriting, never proved that horses ever ran in the past or future, as required by the statute——

The Court: What's required by the statute?

Mr. Palmieri: That horses were to run or had run, the race had taken place or was about to take place.

(4) The Court: Well, wasn't their proof that on that day certain horses ran, which names appeared on this slip which was found?

Mr. Palmieri: Yes.

The Court: Well, that's all the statute requires.

Mr. Palmieri: No, it requires a little bit more than that. There are horses running today.

The Court: Well, I haven't read the cases right, Mr. Palmieri.

Mr. Palmieri: If your Honor will follow my thinking, the mere fact that horses run at a race track doesn't mean a person is a bookmaker because he happens to have in his possession the names of the horses that ran on the same day. In other words, there must be a relationship, there must be a tie in, there must be a pointing to him that "You did place these bets or receive these bets," and so forth.

The Court: That I agree with.

Mr. Palmieri: Which I don't think from reading the transcript, if your Honor please——

The Court: Now, I am not agreeing with you that the transcript doesn't indicate that a (5) crime was committed because if I was of that opinion I would set aside this conviction.

Mr. Palmieri: I understand that and I make these points, as I said, deferentially in my viewpoint. The transcript is barren of any relationship or tie in which would hold the defendant on a charge of that kind.

The Court: I appreciate what you are saying.

Mr. Palmieri: Number two, insofar as the other indictment is concerned, if your Honor please, it is predicated in my opinion solely on the presentation of a case to a jury and the manner in which it is presented and things that happened in a trial. Sometimes they should happen. Sometimes they shouldn't happen. Sometimes they are attributable to zeal. Sometimes they are attributable to lack of knowledge, lack of handling, taking a chance, without permission of the defendant, and I have specifically in mind, if your Honor please, the herculean effort on the part of the Court to protect this defendant at one point and counsel refused to heed the advice of the Court and (6) the question was asked. The question was asked as to whether or not he was ever arrested, mind you, for carnal abuse, something that happened when he was eighteen or nineteen years old.

The Court: That wasn't the situation, Mr. Palmieri. The defendant called in his behalf a character witness and the State then had the record of this defendant and proceeded under the case of *State* v. *Steensen*, and I called counsel to side bar and I think I suggested that it might be well to withdraw the character witness and that wasn't done and of course then the State confronted the witness in accordance with the rule in *Steensen* and brought out the fact that this man had been previously convicted of receiving stolen goods, I think it was.

Mr. Palmieri: That's correct.

The Court: Of course then the defendant did not take the stand and I found myself in a very peculiar position because, as we all know, the only purpose of showing a prior

conviction is so that the jury can consider it in determining what credit it shall give to (7) the testimony of that witness, whether he be a defendant or a witness, and at the time I charged I think I said, and I haven't seen the transcript, even though the jury had before them the fact that this defendant had been previously convicted; in view of the fact that he didn't take the stand I suggested to the jury that they not consider that testimony against the defendant. I think I said that. I haven't seen the transcript. That's what happened. I want to just correct the impression in your mind.

Mr. Palmieri: If your Honor please, I have no impression except the impression that I read from the transcript and make reference to these two specific items when I made mention of the fact perhaps this conviction was predicated on something other than the facts themselves. In other words, what reason would the Prosecutor have in this case to ask a question which he knows is improper? What reason would he have except to inflame the minds of the jury by asking him, "Were you not arrested for carnal (8) abuse?" Since when does an arrest in this country and in this great state mean a conviction?

The Court: He didn't ask that of the defendant. The defendant did not take the stand.

Mr. Palmieri: He asked the question of the character witness, if your Honor please. Of course he didn't take the stand.

The Court: I don't think I permitted that question.

Mr. Palmieri: No. An objection was made and your Honor sustained it but there is nothing in the record that can delete that kind of question from the mind of a jury; nothing, and I say that coupled with the fact that reference was made to a conviction over twenty years old, which is far remote from the crime alleged at hand, I say both of those things played a great part in the decision of that

jury to convict and I think that those two items, if your Honor please, plus one other item which is of grave consequence, brought about the conviction in this case and that is this (9) alleged telephone call made by one George Gottesman to one Sergeant Matthew Kraft, a telephone call which went something like this: Gottesman would ask the questions. He said, "I was in a luncheonette one day and I asked somebody, 'where can I place a bet?' I have some hot horses." And some voice said to him why don't you call such and such a number. Predicated upon that at this luncheonette he called this number, he didn't know where he was calling, and he asked for Danny and Sergeant Kraft happened to be there at the specific time and picked up the phone. "Well, Danny is not here. What do you want?"

"Well, I want to place a bet."

"What do you want to bet on?"

He didn't even know the name of the horse when he testified until his memory was refreshed and his testimony ultimately, if your Honor please, was that the bet was never consummated, it was the first time he had evet made this call, he had never placed any bets with this defendant at that time or prior thereto, had never known him, had no (10) knowledge of him. I can make this representation to the Court at this time because I made that representation to the Prosecutor of this county that we have evidence of substantial nature that George Gottesman committed perjury on the stand before this court. I will go further than that and say that he did it with the knowledge of Mr. Kraft.

The Court: I don't understand. In what respect? I am interested if you say Mr. Gottesman committed perjury.

Mr. Palmieri: If your Honor please, Mr. Kraft lives no more than three or four miles away from Mr. Gottesman. He was assigned to the barracks in that locale for

many years. Every person our investigator interviewed in and around that area knows George Gottesman. Every police chief, every police officer in and around that area knows George Gottesman, who has been in the horse racing business for many, many years. He is an elderly man. Everybody knows George Gottesman. The question was asked of Gottesman whether he knew Kraft and the answer was no. The question was asked of (11) Kraft if he knew Gottesman and the answer was no and all of our investigation reveals that he had to know, he does know him.

The Court: I don't subscribe to that deduction. I don't even know my next door neighbor and I mean that sincerely. I shouldn't say my next door neighbor, but the family that lives across the street, and the reason I say that is because I saw him being arrested across the street from my house, a man that I didn't know. I didn't know he lived there. That happened, and the funny thing, I might state it here, the father of my Court Reporter was making the arrest. That was Monday morning of this week and I didn't know who he was and I still don't know who he is.

Mr. Palmieri: I understand, and I understand that I don't know some of my neighbors, either, but I also understand th t your Honor's position and my position——

The C rt: If you can show me there was perjury committed I th. I am under a duty to consider that but I don't think that t. 's perjury, so I am not going to pay any (12) attentio. o that, Mr. Palmieri.

Mr. Palmieri: Well, the position of this Court, if your Honor please, and y position with reference to whether we know our neighbo.s or not——

The Court: That doesn't indicate perjury. If you had substantial statements in an affidavit that either Gottesman or the Sergeant or both had committed perjury, of course I would be interested in ascertaining what the situation is

but I don't think I can consider your statements as you have presented them to me.

Mr. Palmieri: If your Honor please, I would like to put these statements in the record because——

The Court: Mr. Palmieri, I want you to understand I am not going to stop you from putting anything in the record but when you mentioned that you have proof a witness or witnesses committed perjury, I inquired of you because certainly I would not want to impose sentence on this defendant if there was a question that a witness or witnesses committed perjury. I must state that I can't (13) agree with you that that amounts to perjury, but you may proceed.

Mr. Palmieri: In order that the record may be straight, my words were substantial evidence to indicate that perjury was committed by both George Gottesman and Kraft, and I just want to follow one thought the Court expressed. In spite of your position and mine, we don't know our neighbors, but the fact remains when you are one of two police officers who patrolled this entire area for a number of years, and Mr. Kraft was one of them in this area as a law enforcement officer, George Gottesman has lived and resided for many years, and the fact that George Gottesman was a suspect of arson on several occasions upon which an investigation was made, the further fact when George Gottesman runs horses at Monmouth Park Mr. Kraft must of necessity sign his card when he is given permission to run his horses. All of those things, if your Honor please, I ask that you take into consideration by conference with the Prosecutor or otherwise to determine whether or not these (14) are or are not facts.

The Court: Are you asking me to confer with the Prosecutor on this?

Mr. Palmieri: Yes, sir.

The Court: I don't intend to do it because you have not presented anything which would indicate to me that perjury was committed.

Mr. Palmieri: All right.

The Court: Proceed.

Mr. Palmieri: For all of those reasons, if your Honor please, and for the further reason on the date of this alleged raid a search was made of eighteen or twenty people who were in this tavern, not one of whom had anything concerning horse races or betting and so forth on them, a search was made of the entire place upside down with no relationship whatsoever to horse racing of any kind. The defendant on his possession had nothing of any kind with the exception of this one—would you call it a rundown sheet or a statement of recapitulation of some kind which happened on the day before? Which indicates on the 21st this establishment (15) was not being used or operated that day for the purposes of gambling and the only way this conviction can be sustained is by the allowance into evidence of this telephone conversation, and our position in the matter is we say it does not belong in the case insofar as an allowance of a corroborated or uncorroborated telephone conversation is concerned.

With all those facts I should like to turn now to the personal aspects of this case, if your Honor please. I sent to your Honor and sent a copy to the Prosecutor yesterday an analysis, a statement of analysis of sentencing upon defendants, and the reason I did that was this: As required by the rules, if I was to use it in argument I must serve a copy of it upon my adversary. Number two, this is not an heinous crime. While I make no apologies for the law for convictions and what should happen to defendants, and so forth, on that kind of basis, that is the law and it must be obeyed and enforced. I subscribe to that. The point I make most specifically this (16) morning is this:

That so long as this is not an heinous crime and so long as since June, or whatever it is, since June of 1957, eighteen of twenty-eight persons have been placed on probation by the various judges of this county and in as much as recently December 3, 1959 Judge Collester placed a defendant on probation in this county, I should like to ask the same treatment for this defendant predicated on one thing only and that is that his record as a man, as a human being, as a father, is as good as the record of any of the defendants who were placed on probation by the honorable judges of this court. The reason I say that is this: The only record this boy has is one in 1939, receiving stolen goods, and I think there were several cartons of cigarettes involved.

As a youth—he is presently forty-three years old, born in 1916—that conviction was in 1939. Some eight or ten years after that he married and married well. There are four children of that marriage. He lives with his wife and his four children. I don't know (17) what's in the probation report but I daresay that any investigation worth its salt will prove that perhaps this boy has as good a family as any person in the Oranges that I know of and runs them and operates them and raises them in that kind of fashion. Other than the 1939 conviction there is nothing but there is one important and salient feature of this boy's life and that is that in 1941 he volunteered in the United States Army and served for a period of five years 'til 1946.

If your Honor please, if this boy has done something wrong as evidenced by the conviction in this case I should believe and I should like to believe as a past veteran that the five years of solitary confinement that he spent—and that's exactly what a soldier and sailor does overseas—should be at least something to cancel out perhaps an intended penitentiary or prison sentence which might be imposed upon him today and that for that reason alone, if for no other reason, if he does come from the kind of fam-

ity which your Honor can read from your (18) probation report, that he merits the consideration of this Court in being given that one opportunity. If you sentence him to prison or to a penitentiary it means that you condemn him for life and his children. It means that he will have to go back to this and no other business if he is in this kind of a business or, on the other hand, if you give him the one chance that he pleads for today you will never see him again because he realizes perhaps now more so than ever that he can never answer to his four children the fact that he was in prison and was in jail, and I say that regardless of the fact that he has an elderly mother, regardless of the fact he has a brother who died two weeks ago, regardless of the fact he comes from one of the finest families in Orange, his brother being on the Board of Education, and so forth, on his own merit and on the fact that he gave five years of his life to his country, and I know what that means, five long years, overseas, if your Honor please, that I don't care what crime he committed in this county, that if ever a person should be given an opportunity to make good it should be this veteran of five years. (19) I so implore your Honor with every bit of sincerity in my command, and that's the way I feel about it.

I didn't have this case originally but it doesn't make too much difference to me what happened because it's secondhanded as far as I am concerned, but I feel exactly as I have expressed myself to the Court. If a person should ever—regardless, if your Honor please, he stands naked and bare before you. I know the onus which has been placed upon the Court as a result of overzealousness on the part of relatives and friends, and so forth, who write and call and so forth. That happens to all judges at all times.

The Court: It has made no impression on me.

Mr. Palmieri: I say to you, if your Honor please, regardless of all that, as far as he is personally concerned

he stands before you stark naked and he says, "Give me that one chance for the sake of my four children," and that's all that we ask of you today, your Honor.

(20) The Court: Mr. Palmieri, everything that you have said as to his personal background is true but it would appear to me that this man has been in this business for some time and it would appear to me that this was no small operation. As I recall the evidence, there was offered a slip which indicated some $4000 or $5000 bets. I don't recall the exact amount. Now, certainly, unless something is done with these persons who set themselves up as operators of bookmaking establishments, we are going to permit by fining persons licenses and I don't intend to do that any longer. Yes, in the past, as you have indicated, I have placed people on probation that have been charged with bookmaking but I think that there has got to be a halt. There are too many bookmaking cases going before the courts today and this was no small operation. I want you to know that I am not going to punish this man because he went to trial. He was entitled to his day in court. He must be associated with somebody. This operation cannot just be his. Who are the top men? (21) Now, if this man is willing to disclose I have sixty days in which to change my sentence. I am sure the Prosecutor is interested in stamping out syndicate bookmaking. I have four or five on my list today and that would indicate to me that there is something wrong somewhere. That's what is confronting the judges. You say that we have had, and you made a survey that there have been twenty-eight bookmaking cases before the courts since June 26, 1957. That's two and a half years.

Mr. Palmieri: That's correct.

The Court: I have got five on my list today, I believe. Four or five. There has been an increase in bookmaking for some reason.

Mr. Palmieri: Your Honor made an observation which I would like to, as far as I am personally concerned, have expiated from the record, and your Honor mentioned the word syndicate bookmaking, syndicated crime.

The Court: Don't you think we have syndicated bookmaking?

(22) Mr. Palmieri: Will your Honor hear me out?

The Court: I am just going to ask you a question. Don't you think it is syndicated when you get a man who has bets in the amount of $4000 or $5000? And, if you recall reading the transcript, you will understand that there is testimony in this case that there were layoff bets, and I happen to be familiar with the layoff bets by reason of my experience not only as a judge but as a prosecutor.

Mr. Palmieri: I can answer.

The Court: I will hear you.

Mr. Palmieri: I can answer your question in this fashion: I read the transcript. From reading the transcript it is the opinion of a prosecutor's detective as to what the sheet represented. In conversing with my client the representation in his opinion of the evidence in court is inaccurate.

The Court: Is what? You dropped your voice.

Mr. Palmieri: Inaccurate. Number two, if this were a syndicated crime or syndicated vice yours truly would not be the attorney (23) because yours truly never represented syndicated vice, does not represent syndicated vice.

The Court: If you feel that I made that statement and included you in that I want to say to you that that was not my purpose.

Mr. Palmieri: I wanted it set straight for the record if your Honor please, that I get called on these cases in isolated instances every four or five years for purposes of appeal and so forth and that's my only function here today, and I told your Honor that when I entered the case.

The Court: You certainly did.

Mr. Palmieri: That I certainly want to disassociate myself completely with any statement made by your Honor which might by inference or connotation otherwise indicate that this defendant represents syndicated crime or that I am an attorney for a person in syndicated crime.

The Court: As far as you are concerned I have too much respect for you and I want you to know I meant no offense to you but this is an observation made by the Court of the defendant's activity, of the defendant's activity, not of counsel. This is a $5,000 account of bets (24) or $4,600. I just don't recall the amount, but it was over $4,000. There was a layoff and there is somebody else associated with this man and that indicates to me a syndicate. Now, I don't just state idle words. That was the testimony, and I had an opportunity to observe the exhibits. That's the matter that's before the Court.

Mr. Palmieri: Or it may have been bets made by this defendant personally.

The Court: He never took the stand. He never refuted the State's claim.

Mr. Palmieri: The only reason I say that, if your Honor please, I say in a trial of cause a defendant is inhibited with what is foisted upon him by his counsel and by the handling and he is responsible for the end result.

The Court: I want you to know of course I must take into consideration on this man's background. I must take into consideration that he is a businessman, but I also can't lose sight of the fact that here is a fairly good sized operation and it has been established to the jury's (25) satisfaction that it was a good sized operation. Now, that to me would appear that there were others who are associated with this defendant who may be top level individuals. He knows. I don't. That's my opinion. I certainly will consider everything that you have said.

I will ask the defendant if he wants to add anything to what you have stated or does he want to say anything in mitigation of his sentence.

Defendant Cecere: No, sir.

The Court: I will consider everything that you have said, Mr. Palmieri.

Mr. Palmieri: Thank you, your Honor.

(Recess.)

Sentence.

The Court: Dan Cecere, I don't think there is any need of my saying any more. Your counsel has presented all of the facts that I have considered. I have given a great deal of time to your report and also have considered all of the facts presented at the trial.

On indictment 1668-58, not less than one year, not more than three years in the (26) New Jersey State Prison. On indictment 1669-58, not less than one year, not more than three years in the New Jersey State Prison, this sentence to run concurrent with the sentence imposed by the Court on indictment 1668-58.

Mr. Palmieri: Would your Honor entertain a motion to have the defendant admitted to bail pending prosecution of the appeal?

The Court: I will deny bail because I see there is no question as to the defendant's guilt in my mind, unless the Prosecutor consents to bail, but I will hear you if you want to be heard.

Mr. Palmieri: Well, your Honor apparently has already made up his mind so there is no point in pursuing it.

The Court: Well, I think that's the only alternative that I have because I see no error in the trial nor any question of the defendant's guilt in my mind.

Mr. Palmieri: Except your Honor has not heard my application.

The Court: I will hear you. I will hear you. (27) I said I will hear you. I said that. If you want to wait I will hear you. I will have the defendant remain available.

Mr. Palmieri: If your Honor has prejudged my application—I say this deferentially and respectfully—it doesn't seem I should go through the motion when your Honor has prejudged it and said he would not admit the defendant to bail.

The Court: You have said that you would like to make an application.

Mr. Palmieri: To have the defendant admitted to bail.

The Court: After I have completed my list.

Mr. Palmieri: That's correct, sir.

The Court: I have considered your application as if you have it: I have denied your application.

Mr. Palmieri: Thank you, sir.

APPENDIX B.

Motion to Set Aside Judgments of Conviction, etc. (Perjury).

To: Honorable Brendan T. Byrne,
Prosecutor of Essex County:

PLEASE TAKE NOTICE that on Tuesday, May 24, 1960, at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard, I shall apply to the Superior Court, Appellate Division, at #520 Broad Street, Newark, New Jersey,

1. for an order to set aside the judgments of conviction and the entry of judgments of acquittal in favor of defendant;

2. for an order to set aside the judgments of conviction and remand both cases to the court below for retrial;

3. that it retain jurisdiction of the appeal pending before it and remand both cases to the court below to permit defendant to make his motion to set aside the judgments of conviction, and for the entry of judgments of acquittal;

4. for an order directing the court below to hear and determine the motion of the defendant to set aside the judgments of conviction and for the entry of judgments of acquittal in favor of defendant;

5. for an order directing the court below to file an opinion with the Appellate Division after said lower court has heard the motion of the defendant as aforestated, so that the Appellate Court may review the entire matter and enter such order as it may deem proper and appropriate under the circumstances;

6. for said Appellate Court to exercise such original jurisdiction as may be necessary to make a full and complete determination of this matter and these cases pursuant

to New Jersey Constitution Article 6, Section 5, Paragraph 3 and R. R. 2:5.

The ground upon which this motion is predicated is the allegation made by the defendant that George Gottesman committed perjury in the trial of both cases in the court below.

At the hearing of this motion I shall rely upon the Brief and Appendix attached hereto and made a part hereof; the Briefs and Appendices heretofore filed in this cause by both the Defendant-Appellant and the Plaintiff-Respondent and the typed but unprinted Transcript of Testimony of George Gottesman before Board of Public Utility Commissioners.

FRANK A. PALMIERI,
Attorney of Defendant-Appellant.

Facts Upon Which Motion Is Based.

The within causes now pending before this Court for review and determination. All briefs and appendices have been filed and the oral argument has been completed. No decision has been rendered as yet.

One of the most important phases of these cases evolves around a telephone call allegedly made by one George Gottesman to the defendant's place of business. This call was allegedly received by Detective Sergeant Matthew W. Kraft, a member of the State Police assigned at that time to the Essex County Prosecutor's Office. Testimony concerning the contents of the telephone conversation was introduced into evidence over defendant's objections (D75a-33 to D76a-10). Detective-Sergeant Kraft testified that he received the call from a person who identified himself as

Appendix B—Facts Upon Which Motion Is Based.

George Gottesman (D75a-22 to D76a-31) and testified to the contents of the conversation. He further testified that *he did not know George Gottesman* prior to the telephone call being received by him (D84a-16 to 25). George Gottesman testified on behalf of the State that he did make the aforesaid telephone call and testified to his version of the conversation had at that time (D92a-14 to D93a-10). He also testified that *he did not know Detective-Sergeant Kraft* (D97a-1 to 10).

It was contended by the defense from the very inception of the mention of said telephone call that it was spurious (D75a-33 to 40). This contention of spuriousness was maintained throughout the trial and the telephone call was vehemently attacked throughout the trial through the means of cross examination and argument (D81a-23 to 86a-8; D95a-21 to D96a-20; D97a-1 to 10; D97a-15 to D98a-48; D132a-34 to D133a-25; D141a-20 to D143a-15). As far as this defendant was and is concerned the alleged telephone call was spurious and the relationship between the initiator of the alleged telephone call and the recipient thereof prior to said call was of monumental importance.

A great deal of stress was placed upon this telephone call by the Prosecutor in his quest for a conviction (D75a-23 to D76a-32; D92a-1 to D93a-8; D96a-22 to 40; D125a-30 to 40; D139a-18 to 32). This importance is further demonstrated by the summation of the Prosecutor wherein he said:

> "Now in addition to that we have Sergeant Kraft of the State Police assigned to the Prosecutor's office who answered the telephone, and this Mr. Gottesman wanted to know if Danny's there. Is he talking about the defendant? I don't know. I will tell you why we don't know in a little while. He said 'No, Danny isn't here. What do you want?'
>
> 'I want to place a bet.'

'What's your name?'

He gives the Sergeant his name. He said,

'I want to bet ten and twenty.' If my memory serves me correctly, that's what he wanted to bet—ten and twenty.

'All right, I will tell him,' or words to that effect." (D166a-5 to 20).

"* * * and that also together with the telephone call, because that's only a means of communication, only a means of communication to place your bet. You have a right to draw on your own experiences to determine whether or not that sometimes these bookmakers even run charge accounts and take these calls over the telephone, and 'I will take your bet and if you wish I will pay you when you come in. If you lose you pay me. You will pay me anyway.'" (D169a-10 to 18).

The alleged telephone call became and was the most salient and potent part of the State's case on both indictments.

The trial court itself treated the alleged telephone call as a very important factor in the case (D142a-1 to 5; D142a-22 to 24; D143a-15 to 28). This is further pointed out by the following excerpts from the judge's charge:

"While the officers were on the premises the telephone rang, which was answered by Sergeant Kraft. The person calling identified himself as George Gottesman and asked for Dan. He was told by the officer that Dan was busy and then asked that a bet of twenty and ten be placed on Wise Master, a horse entered in a race at Lincoln Downs. The State produced George Gottesman who corroborated the testimony of Sergeant Kraft" (D181a-35 to D182a-10).

Appendix B—Facts Upon Which Motion Is Based.

> "The facts in this case which the Court recalls which the defendant could by his oath deny are these—* * *; and, five, the testimony of the officer as to the use of the telephone in the defendant's place of business." (D182a-30 to D183a-5).

The defendant requested the court to charge the jury (Request No. 9) on the law concerning spuriousness of telephone cases (D191a-24 to 32). The trial court so charged the jury.

After the trial and prior to sentencing, defense counsel and defendant employed the services of one Cornelius Ryan, a private investigator, to conduct an investigation to ascertain if George Gottesman and Detective-Sergeant Kraft knew each other prior to the arrest of defendant because of defendant's insistence that said telephone was never used for the purposes testified to. Mr. Ryan concluded, as a result of his investigation, that Detective-Sergeant Kraft and George Gottesman knew each other for sometime prior to the arrest of the defendant and that they had probably committed perjury in the trial of the causes. Frank A. Palmieri, Esq., the substituted attorney for the defendant, conferred with the Prosecutor of Essex County and made known to him the facts and conclusions of said Cornelius Ryan. The Prosecutor of Essex County refused to follow the request made of him at that time by said Frank A. Palmieri that the matter be investigated.

On the day of sentencing, Frank A. Palmieri made a motion and plea on behalf of defendant wherein he advised the Court that he had conferred with the Prosecutor and that he had evidence of a substantial nature that George Gottesman committed perjury in the trial of these causes (D196a-1 to D198a-17). The Court was also requested to confer with the Prosecutor relative thereto which the Court refused to do (D198a-34 to D199a-5).

Appendix B—Facts Upon Which Motion Is Based.

Thereafter this appeal was taken to this Court and in Point Four of the brief filed herein (Db10-23 to Db12-30), the defendant charged that the testimony of George Gottesman was false and unbelievable and that the telephone call was spurious. The argument proceeds on to say that because of those facts, the telephone call and the telephone conversation should not have been admitted into evidence; that the testimony was damaging; and that had said testimony been excluded, the verdict would in all probability have been different.

So that there can be no refutation of the insistent and persistent claim of the defendant that the telephone call was counterfeit and spurious.

While this appeal was pending and as the result of defendant's inability to further the investigation because of lack of subpoena and other investigatory powers, it was conceived that the truth might be ascertained if George Gottesman could be placed under oath some way, somehow and be subjected to rigid examination. It was thereupon decided that a petition be filed with the Board of Public Utility Commissioners to compel the New Jersey Bell Telephone Company to install a telephone at #140 South Essex Avenue, Orange, New Jersey, which service had been denied because of defendant's arrest and conviction and upon orders of the Prosecutor of Essex County.

On April 27, 1960, a hearing on said petition was held by the Board of Public Utility Commissioners before Hearing Examiner Jack Schwartz. George Gottesman was called to the stand and was duly sworn. He testified concerning the very same telephone call with which we are concerned. A full and complete copy of the transcript of said testimony is herewith submitted to the Court. Mr. Gottesman testified thereat that *he knew Detective-Sergeant Kraft* and had so known him for about 4 or 5 years. (See pages 82, 83, 84, 85 and 86 of transcript). This of course was in direct con-

flict with his previous testimony in the trial of these causes wherein *he said he did not know Detective-Sergeant Kraft* (D97a-1 to 10). He also testified concerning the conversation had in said telephone call, which testimony *was not the same* as that given in the trial court. (See pages 89, 90 and 91 of transcript; D95a to D96a).

A reading of the entire transcript of Gottesman's testimony before the Public Utility Commission proves that Gottesman committed perjury while testifying in the trial court and that the insistent and persistent claim of the defendant that Gottesman lied in his testimony below has been completely sustained.

Verification of Facts Upon Which This Motion Is Based.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

DANIEL CECERE being duly sworn according to law upon his oath deposes and says:

1. I am the defendant in the within causes.

2. I have read the foregoing facts and I know them to be true of my own personal knowledge.

DANIEL CECERE.

Sworn and subscribed to before me }
this day of May, 1960. }

MILDRED E. MARIANI,
A Notary Public of New Jersey.
My Commission expires December 5, 1961.

ARGUMENT.

Throughout the trial of the within causes the defendant contended and maintained that the telephone call allegedly made by George Gottesman and allegedly received by Detective-Sergeant Kraft was spurious and counterfeit. The defendant's objection thereto was vehement as well as continuous. Without its admission into evidence there could probably be no judgments of conviction, as a matter of law. Certainly, even if the cases were allowed to go to the jury, the probability of conviction would have been remote, to say the least.

The defendant attacked the telephone call at and during the trial, by Request to Charge, on his plea before sentence and in his brief on his appeal to this court.

There can be no refutation of the fact that defendant has yelled loud and clear from the beginning to this day that Gottesman lied and that his conviction was the result of his perjury and that of Kraft.

The charge of the defendant that perjury was committed by Gottesman and Kraft in the trial court has been proved beyond any doubt.

The object of this motion is to point up the perjury and seek relief from this court so that the devastating effects of the perjury which caused the conviction of the defendant may be eradicated in the interest of justice and fair play to and for this defendant.

Through the medium of this motion the defendant reiterates his original and sustained allegation that the telephone call was spurious and counterfeit and that Gottesman and Kraft testified falsely in the court below. He goes further and reports to the court the indisputable evidence that perjury was committed by said State's witnesses in the court below and that such perjury is of such materiality that the course of events of the trial (and the

ultimate conclusion thereof) was changed, resulting in his conviction rather than his acquittal on both indictments.

The telephone call in question was certainly the most potent direct evidence that, allowed in evidence, led to the conviction of the defendant on both indictments. This is borne out by the introduction of said testimony, the prosecutor's reference thereto in his summation (D166a-5 to 20; D169a-10 to 18) and the trial judge's reference to said call in his charge (D181a-35 to D182a-10; D182a-30 to D183a-5). This is not a mere piece of evidence which, it might be contended, is so insignificant and immaterial that it would not have changed the course of events. It is a *sina qua non* without which there could not have been a conviction in either case.

In the original brief filed herein (Point Four thereof) the defendant argued that the trial court should have determined if the circumstances rebutted every suspicion that the call may have been spurious. The argument went on to say that the trial court failed to make said determination and had in fact transferred that determination to the jury. Therefore, the jury was called upon to weigh the testimony before it and determine whether or not the call was counterfeit. In making such a determination, the most important fact necessary was whether or not the person making the call and the person receiving the call knew each other. This is certainly amply demonstrated by the prosecutor's attempt to rebut suspicion that the call was spurious by asking George Gottesman on re-direct examination if he knew any of the detectives. In his answer thereto George Gottesman said, "No sir" (D96a-24 to 40). Defense counsel pinpointed the matter by asking George Gottesman if he knew Detective-Sergeant Kraft and again he answered "No sir" (D97a-1 to 10). It goes without saying that it is very unlikely that two persons who do not know each other will counterfeit a telephone call.

They must know each other in order to plant or counterfeit a telephone call.

The Prosecutor asked the question of Gottesman and put into evidence his negative answer for the sole purpose of gilding the lily and attaching to the telephone incident the cloak of authenticity, genuineness and credibility.

That it paid dividends is evidenced in the convictions entered in the causes below.

If Gottesman had told the truth and had admitted knowing Kraft and had the latter admitted knowing Gottesman the defendant could have then adduced the information which we were able to bore out of Gottesman on the stand before the Public Utility Commission. That being so, the course of events below would have been different because a mere reading of the Transcript of Gottesman's later testimony can lead the reader to but one conclusion and that is that *he is not telling the truth* and that he lied in the court below.

In furtherance, when the trial court failed to make the required inquiry concerning said telephone call as to its spuriousness, the trial judge handed to the jury his original responsibility to decide. The jury was compelled to make a determination as to whether the call was or was not spurious. The jury made its determination predicated upon perjured testimony rather than upon the truth—the fact that Kraft and Gottesman knew each other before the date in question. (See pages 82, 83, 84, 85 and 86 of Transcript.)

It is contended by the defendant that had the truth been told by Gottesman and Kraft, the interrogation would have opened new vistas. Armed with the knowledge that Gottesman and Kraft knew each other, coupled with the incredible testimony of Gottesman as adduced before the Public Utility Commission, the jury most likely would have rejected the telephone call and led it to return verdicts of innocence rather than of guilt.

No conviction can be sustained on perjured testimony.

Appendix B—Conclusion.

The testimony of George Gottesman, both in the court below and before the Public Utility Commission, is false and unbelievable. The judgments of conviction should not be permitted to stand.

Conclusion.

It is therefore respectfully submitted that this court should

1. enter an order setting aside the judgments of conviction and enter judgments of acquittal in favor of defendant; or

2. enter an order setting aside the judgments of conviction and remand both cases to the court below for retrial; or

3. retain jurisdiction of the appeal pending before it and remand both cases to the court below to permit defendant to make his motion to set aside the judgments of conviction, and for the entry of judgments of acquittal;

4. enter an order directing the court below to hear and determine the motion of the defendant to set aside the judgments of conviction and for the entry of judgments of acquittal in favor of defendant; or

5. enter an order directing the court below to file an opinion with the Appellate Division after said lower court has heard the motion of the defendant as aforestated, so that the Appellate Court may review the entire matter and enter such order as it may deem proper and appropriate under the circumstances;

6. exercise such original jurisdiction as may be necessary to make a full and complete determination of this matter and these cases pursuant to New Jersey Constitution Article 6, Section 5, Paragraph 3 and R. R. 2:5.

Respectfully submitted,

FRANK A. PALMIERI,
Attorney for Defendant-Appellant.

APPENDIX B1.

Order Denying Defendant's Motion to Set Aside Judgments of Conviction.

The above matter having been presented to the Court by Frank A. Palmieri, Esq., Attorney for the Defendant Dan Cecere, in the presence of Sanford M. Jaffe, Assistant Prosecutor, appearing on behalf of the State of New Jersey, upon a Notice of Motion to set aside judgments of conviction, etc. entered in the above cause it is on this 10th day of June, 1960,

ORDERED, that the Motion is hereby denied.

HAROLD A. PRICE,
S. J. A. D.

Entry of this Order has been consented to as to form by Frank A. Palmieri, Esq., Attorney for the Defendant Dan Cecere.

/s/ FRANK A. PALMIERI.

APPENDIX C.

Opinion of Appellate Division.

Argued March 22, 1960—Decided June 10, 1960.

Before Judges PRICE, GAULKIN and FOLEY.

MR. FRANK A. PALMIERI argued the cause for Defendant-Appellant.

MR. SANFORD M. JAFFE, Legal Assistant Prosecutor, argued the cause for Plaintiff-Respondent (MR. BRENDAN T. BYRNE, Essex County Prosecutor, attorney).

The opinion of the court was delivered by FOLEY, *J. A. D.*

Defendant appeals from two judgments of conviction entered in the Essex County Court on jury verdicts. The indictments, which were consolidated for trial, charged bookmaking on March 20, 1959 and keeping a gambling resort on March 21, 1959 contrary to the provisions of N. J. S. A. 2A:112-3.

The State proved the following sequence of events. On March 21, 1959 at about 12:30 P.M., the Prosecutor's Detectives, Jerome DeStefano and Peter Kenny, and State Police Sergeant Matthew W. Kraft arrived at the Berkeley Bar at 140 Essex Street, Orange, New Jersey. The Tavern is owned and operated by the defendant. DeStefano and Kraft entered the premises; Kenny remained outside. DeStefano approached the defendant who was in the rear of the tavern; Kraft took a position at the bar. Both officers identified themselves by exhibiting their badges.

DeStefano testified that the defendant was talking to a colored man who was near a Skillo machine and that as he approached he saw two other colored men, one sitting at a

table and another standing to his right. The seated man had a pencil in his hand and in front of him was an Armstrong sheet and a piece of paper on which were written the names of two horses entered in the day's races at Gulfstream Park, Florida. As DeStefano turned to pick up the slip of paper from the table Cecere bolted for the front door. There he was met by Detective Kenny. A struggle ensued which ended on the street in front of the tavern when, with Kraft's aid, Kenny was able to subdue Cecere. In the confusion the detectives lost track of the two colored men at the table and they were never apprehended.

Kraft testified that as defendant was attempting to flee he tried to take off his coat; Kenny indicated that by the time the defendant had run into him one arm was out of the coat. He refused to be searched but emptied his pockets of $666 in cash and checks amounting to several hundred dollars. He also took from his inside jacket pocket an Armstrong sheet dated March 20, 1959 and placed that on the table. DeStefano said that he removed a small green notebook from the pocket of defendant's coat in which he found a sheet of paper on which horse race bets for March 20, 1959 were noted. These evidenced total bets of $5,000 for five people. DeStefano was qualified as an expert on bookmaking paraphernalia and testified in great detail concerning the relation of this sheet to a bookmaking operation. It is entirely clear from his testimony that the articles and data found on Cecere graphically portray the bookmaker's part, as distinguished from that of a bettor, in the gambling scheme.

While the investigation was in progress a telephone rang and Kraft answered it. The caller asked for "Dan," identified himself as George Gottesman of Succasuana, N. J., and placed a $30 bet on a horse. Gottesman corroborated this testimony saying that he did not recall the horse's name, but thought it was "Market something or Wise

Market." The State established a horse named "Wise Master" was entered that day in a race at Gulfstream Park.

Defendant moved for a judgment of acquittal at the close of the State's case which motion was denied. Defendant called two character witnesses and rested without taking the stand. The motion for acquittal was then renewed and again denied.

Initially, defendant makes the point that the trial court erred in ordering that the indictments be tried together. See R. R. 3:5-6. No objection was made during the trial to the consolidation nor did defendant seek a severance as provided for by R. R. 3:5-7. Moreover, defendant concedes that the joinder was discretionary. Actually the argument made does not conform with the point as stated. Rather defendant's thesis seems to be that in failing to "accentuate" that two crimes were charged the Prosecutor and the Court combined to commit error. No authority is cited for this proposition and we find it to be without substance. Furthermore the court in its charge defined the elements of each alleged offense in clear and unmistakable language.

Next it is urged that the federal rule with regard to the exclusion of all evidence obtained through unlawful searches and seizures is the law of the land and should be adopted and embraced by the courts of the State of New Jersey. The same contention was recently rejected by our Supreme Court in *Eleuteri* v. *Richman*, 26 N. J. 506 (1958).

Defendant challenges the admissibility of Kraft's testimony concerning the telephone conversation with Gottesman. Our courts have consistently held such testimony to be admissible. See *State* v. *Smith*, 21 N. J. 326, 334 (1956); *State* v. *O'Donnell*, 8 N. J. Super. 13, 16 (App. Div. 1950). Moreover, this case presented the somewhat unusual situation of the caller testifying at the trial in confirmation of the conversation.

Ralph Minichiello when called as a reputation witness testified on direct examination that he had known the defendant for "25 years or more," and that his reputation as "a law abiding citizen" and his reputation for the conduct of "law abiding business" was good. On cross examination the following took place:

> "Q. Mr. Minichiello, have you heard that on May 10, 1939 this defendant was convicted of the crime of receiving stolen goods and was sentenced by Judge Walter Van Riper to one year in the Essex County Penitentiary, execution of the sentence suspended and was placed on probation for three years at twenty-five cents a week? *Did you know that?* A. No, sir." (Emphasis added.)

It will be noted that defendant did not object to the question. See R. R. 3:7-8. Notwithstanding, defendant now claims error such as calls for invoking the "plain error" rule, R. R. 1:5-1, the argument being that the wording "Did you know that?" offends the edict of *State* v. *Steensen*, 35 N. J. Super. 103 (App. Div. 1955), that the question must be directed to what the witness has *heard* rather than what he *knows*. The State frankly concedes that the italicized portion of the question was improper but urges that the defect was in the form of the question as distinguished from its substance and that in any event, no harmful error was committed. We agree.

Defendant argues further that there was a noncompliance with the following directive contained in *Steensen*:

> "In determining whether to allow the cross-examination, the trial court should conduct a preliminary inquiry out of the presence of the jury and he should satisfy himself:

(1) that there is no question as to the fact of the subject matter of the rumor, that is, of the previous arrest, conviction, or other pertinent misconduct of the defendant;

(2) that a reasonable likelihood exists that the previous arrest, conviction or other pertinent misconduct would have been bruited about the neighborhood or community prior to the alleged commission of the offense on trial;

(3) that neither the event or conduct nor the rumor concerning it occurred at a time too remote from the present offense;

(4) that the earlier event or misconduct and the rumor concerned the specific trait involved in the offense for which the accused is on trial;" • • •" 35 N. J. Super. at 109.

We think otherwise. The record clearly shows that at a side bar conference the court was informed that the State was prepared upon the basis of an F.B.I. report to show that Daniel Cecere had been convicted on May 10, 1939 of receiving stolen goods. Obviously, the testimony that the defendant was reputed to be "a law abiding citizen" and the operator of "law abiding businesses" opened the avenue of inquiry under consideration. Plainly, the trial court in the exercise of sound discretion had the right to conclude that such an event would be bruited about a community such as the city of Orange. And the fact that it occurred 21 years before did not defeat the question since at defendant's instance Minichiello had testified on the basis of acquaintance with defendant over a span of 25 to 30 years.

Defendant also urges as error a question put to his other character witness, Dr. Joseph E. Higi. In doing so he ignores the fact that his objection to the question was sustained. If, as is now suggested, the mere asking of the

question was prejudicial the proper course for defendant to have taken was to move for a mistrial. This was not done and so we find no judicial action to review.

Defendant contends also that (1) the court erred in commenting upon the failure of defendant to testify, (2) the charge was erroneous and incomplete on the subject of "flight," (3) the charge was ambiguous and confusing, and (4) certain remarks made by the prosecutor were highly improper and prejudicial. Again reliance is placed on the plain error rule. Defendant's brief tacitly admits that there was some direct evidence bearing on his guilt in keeping a gambling resort which he was in a position to deny. Thus the principles laid down in the cited cases of *State* v. *Friedman*, 136 N. J. L. 527 (E. & A. 1948) and *State* v. *Anderson*, 137 N. J. L. 6 (Sup. Ct. 1948) are inapposite. Rather the case is controlled by *State* v. *Dancygier*, 29 N. J. 76, 88-90 (1959), *cert. denied*, 360 U. S. 903 (1959) and *State* v. *Corby*, 28 N. J. 106 (1958), both of which furnish support for the charge as given. The remaining criticisms of the charge as enumerated are without merit when considered in light of the well established rule that in determining whether an instruction was erroneous the test is how and in what sense, under the evidence before the jury and the circumstances of the trial, ordinary jurors would understand the charge as a whole. *State* v. *Ellrich*, 10 N. J. 146, 157 (1952); *State* v. *Pitman*, 98 N. J. L. 626 (Sup. Ct. 1923), *aff'd*, 99 N. J. L. 527 (E. & A. 1924). Similarly the challenge to the prosecutor's summation lacks substance. See *State* v. *Bucanis*, 26 N. J. 45, 56-57 (1958), *cert. denied*, 357 U. S. 910 (1958); *State* v. *Vaszorich*, 13 N. J. 99, 118-20 (1953), *cert. denied*, 346 U. S. 900 (1953).

The final point made is that the "defendant was not afforded a fair trial." A melange of alleged trial errors none of which was brought to the attention of the trial court is offered in support of the argument. This argument is unimpressive to say the least.

Affirmed.

Mandate on Affirmance.

This cause having been duly argued before this Court by Frank A. Palmieri, counsel for the appellant and Sanford M. Jaffe, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgments of the said Essex County Court is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Essex County Court to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

Witness the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 10th day of June, 1960.

I. Grant Scott,
Clerk of the Superior Court.

APPENDIX D.

Order.

(Filed November 14, 1960.)

SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY, Plaintiff-Respondent, *vs.* DAN CECERE, Defendant-Appellant.	Docket No. 3236. On Motion to Dismiss Appeal.

This matter having been duly presented to the Court, it is Ordered that the motion to dismiss appeal is granted.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 14th day of November, 1960.

JOHN H. GILDEA,
Clerk.

APPENDIX E.

Order.

(Filed November 14, 1960.)

SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY, Plaintiff-Respondent, *vs.* DAN CECERE, Defendant-Petitioner.	On Petition for Certification. Order Denying Petition.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 14th day of November, 1960.

JOHN H. GILDEA,
Clerk of the Supreme Court.

APPENDIX F.

Excerpts of Testimony.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

Newark, N. J., Wednesday, April 27, 1960.

In the Matter of Petition of Berkeley Bar, Inc., 140 South Essex Avenue, Orange, N. J., re refusal of New Jersey Bell Telephone Company to supply telephone service.	Docket No. 602-148.

Before:

Examiner Jack Schwartz, Executive Officer.

For Petitioner appears:

Frank A. Palmieri, Esq., 327 Main Street, Orange, N. J.

For Respondent appears:

Frank P. Combs, Esq., 540 Broad Street, Newark, N. J.

(Commencing at 62-1):

George S. Gottesman, sworn on behalf of Petitioner.

Mr. Combs: Before this witness testifies, your Honor, I would like to inquire of counsel what his purpose is in putting this witness on the stand.

generally, and what he intends to have him testify to. Because I have reason to know what it is, and I would like to object in advance, if I may.

Examiner Schwartz: I think you ought to raise your objections as the questions are posed to this witness. The Court doesn't know what he is going to testify to, and when the questions are posed to this witness, you will have an opportunity to make any objection that you think you should make, Mr. Combs. I think we will save time by going right into the interrogation.

Direct examination by Mr. Palmieri:

Q. Mr. Gottesman, have you stated where you reside? A. No. 4 Mark Lane, Succasunna.

Q. How old are you, Mr. Gottesman? A. Sixty.

Q. Are you here under subpoena? (63) A. I am.

Q. Do you feel all right today? A. Not too good, no.

Q. Were you sick yesterday? A. I was.

Q. You didn't want to appear here this morning, did you? A. That's right. I called your office this morning to beg off.

Q. And you called yesterday and said you were sick? A. That's right.

Q. Had you ever been in the Berkeley Bar prior to March 21, 1959? A. I was never there. I don't even know what it looks like.

Q. And before March 21, 1959 and on March 21, 1959, did you ever place a bet on a horse race with Daniel Cecere? A. No, sir.

Q. On that day and prior thereto, had you ever talked to Dan Cecere? A. No, sir, I never knew him.

Mr. Combs: At this point, your Honor if you will hold the answer, I would like to object to the question-

ing of this witness and the introduction of anything further from him, any further evidence, for the (64) reason that this man was a witness at the trial, the criminal proceedings, and he testified to certain things that I know counsel is leading up to.

I say that this testimony has no place in this hearing before this Board, because we are not inquiring into the merits of the case against Mr. Daniel Cecere. That has been passed upon by a court of competent jurisdiction and a jury of his peers, and he has been found guilty.

Now, this is an attempt by counsel to open up certain testimony that was given at that trial. I think it is highly improper, based on numerous decisions of this Board, which have stated that it will not look behind the motives of duly authorized police officials, including, of course, prosecutors.

Therefore, I say that this has no place and no bearing, and I ask that further testimony from this witness be suppressed.

Examiner Schwartz: Overruled, Mr. Combs. I don't understand that this Board has ever refused to receive facts in a case of this (65) kind. Now, what action this Board may or is authorized to take on the basis of those facts is something else again, but from what I gather so far, the testimony has not been irrelevant to the issues here involved. I don't know what form any further testimony may take. I am not going to make any ruling on questions that haven't been asked yet. I am going to allow counsel to proceed with his examination of this witness.

Mr. Combs: May I reserve and renew my motion at the end of the testimony, sir?

Examiner Schwartz: You may.

Mr. Combs: Very well.

Appendix F—Excerpts of Testimony.
George S. Gottesman, for Petitioner—Direct.

Q. Did you on March 21, 1959, or any time prior thereto, ever place a bet with Dan Cecere? A. No, sir.

Q. Did you ever place a bet on March 21st or prior thereto on any horse race? A. With whom?

Q. With Dan Cecere. A. No, sir.

Q. Did you ever place a bet with anyone whom you consider or considered as an agent or employee of Dan Cecere? (66) A. No, sir.

Q. Did you on or before March 21, 1959, ever call the Berkeley Bar at 140 South Essex Avenue on the telephone? A. No, sir.

Mr. Combs: Is this on or before?

Mr. Palmieri: My questions are being asked.

Mr. Combs: Read that again, please, so the witness knows.

Mr. Palmieri: If your Honor please, I think that counsel should permit me my direct examination and he shouldn't be so concerned about this witness, and let him make his objections properly to the Court.

Mr. Combs: I ask merely that the question be reread, that's all.

Examiner Schwartz: I will allow the question to be read so you can follow it.

Mr. Combs: And the witness.

Examiner Schwartz: Do you know what the question is, Mr. Gottesman?

Witness: It is a question of——

Examiner Schwartz: Do you want the question read to you?

Witness: Yes, please.

(67) (Question and answer read by Reporter.)

Q. Mr. Gottesman, you didn't know Daniel Cecere before March 21, 1959, did you? A. No, sir.

Q. And you had never met him before? A. No, sir. May I ask one question?

Q. Just a moment.

Examiner Schwartz: If Mr. Gottesman wants to address a question to the Court, it is perfectly all right. What is on your mind, Mr. Gottesman?

Witness: What date March 21 was, a Saturday or what?

Mr. Combs: That was the date of the raid by the Prosecutor, wasn't it?

Mr. Palmieri: Mr. Combs, is that clever?

Examiner Schwartz: The witness only asked what day of the week it was, Mr. Combs. You are not helping him very much. If you know it is a Saturday and you can state that as a fact, it may help the witness.

Mr. Combs: That's correct.

Mr. Palmieri: It is admitted that March 21 is a Saturday, your Honor.

(68) Examiner Schwartz: It was a Saturday. Does that help you any, Mr. Gottesman?

Witness: I did make a call, but not to Cover. I made a call, period, no particular person.

Examiner Schwartz: I didn't place any question to you, Mr. Gottesman, and there is no question pending as far as I am concerned. You merely had inquired whether March 21, 1959, was a Saturday, and you received that information. Now Mr. Palmieri will resume his examination.

Q. On March 21, 1959, you made a call, you say, but to no particular person? A. That's right.

Q. You made a call to what telephone? A. I don't remember the name there, the number, rather, at this particular time.

Appendix F—Excerpts of Testimony.
George S. Gottesman, for Petitioner—Direct.

Q. Did you make a telephone call to a number? A. Yes.

Q. And where had you received the number? A. I met somebody at a diner and the party suggested if I ever wanted to call anybody for placing a bet, I could reach him at that number.

Q. At that number. And this person gave you a number?

(60) A. That's right.

Q. What was the name of the person in this diner who gave you that number? A. Just casually met him there.

Q. Had you ever met him before? A. No, sir.

Q. Had you ever seen him before? A. No, sir.

Q. Was anybody present when your conversation was had with this man in this diner? A. Well, there were other people sitting around. Whether they heard the question and answer, I don't know.

Q. Give us the names and addresses of the people who were present. A. I wouldn't know. I just dropped in.

Q. Had you ever seen them before? A. No, sir.

Q. This man accosted you, or did you accost him? A. No, I happened to be talking to somebody who was sitting there.

Q. To whom were you talking? A. Some fellow there just looking at the paper and I said, "Let me look at the paper, I have a horse going," and we started a conversation.

Q. Did he ask you who you were? A. No.

Q. Did you ask him who he was? A. No.

Q. Where was this diner? A. Whippany.

Q. What is the name of the diner? A. I think it is called Whippany Diner.

Q. Where is it located? A. On Route 10.

Q. Who is it owned by? A. I don't know. I just dropped in there.

Q. Had you been in there before? A. No, sir.

Q. Have you been in there since? A. No, sir.

Appendix F—Excerpts of Testimony.
George S. Gottesman, for Petitioner—Direct.

Q. Is Whippany near Succasunna, where you live? A. About seven or eight miles.

Q. What time of the day was this? A. Oh, about lunch hour, 12:00 o'clock, 12:30, around there.

Q. This was on March 21, now, 1959? A. No, that was previous to this.

Q. When previous to this? A. Several months before that.

Q. And you kept the telephone number all that time? (71) A. Just had it on a scrap of paper.

Q. You kept it on that scrap of paper? A. That's right.

Q. Now, you had bet horses before with others, had you not? A. That's right.

Q. So far two months you have this number on a scrap of paper, is that correct? A. That's right.

Q. And on March 21, 1959, you decided to call this number, is that correct? A. That's right.

Q. You didn't know who you were calling? A. No, sir.

Q. You had never placed a bet with him before? A. No, sir.

Q. But you pulled this slip of paper out of your pocket? A. That's right.

Q. At what time of that day did you pull it out of your pocket? A. Oh, it was pretty near noon hour, I imagine.

Q. Were you home when this happened? A. No, I was in a public booth.

Q. Where was the public booth? A. Up near Succasunna.

Q. Where near Succasunna? (72) A. Well, I imagine—it must have been on Route 10 there.

Q. You must have been? A. I can't remember exactly now.

Q. Well, could you remember it at the time of the cause below? A. If I said that.

Appendix F—Excerpts of Testimony.
George S. Goffesman, for Petitioner—Direct.

Q. I am not telling you what you said. I am asking you now whether you remember where you made that call from. A. No, I don't remember. Route 10, I imagine.

Q. Where on Route 10? A. I don't know.

Q. What kind of a building was it? A. Just a booth.

Q. What kind of a booth? A. One of those pay stations.

Q. Outdoor pay station? A. That's right.

Q. How many were there, one or two booths? A. I don't remember.

Q. You don't remember that? A. No.

Q. Where were the booths on Route 10? A. I just don't remember offhand.

Q. Route 10 is forty miles or fifty miles long, isn't it? A. That's right.

Q. Exactly where was it? (73) A. Somewhere in Succasunna, I imagine.

Q. In Succasunna. Are you sure it was in Succasunna? A. Just a guess.

Q. You don't know where you made this telephone call from? A. No, sir.

Q. Don't have the slightest idea? A. I am on the road a good deal of the time. I wouldn't remember where I stopped to make a telephone call.

Q. You don't remember where that specific call was made? A. No, sir.

Q. Were you at home on March 21, 1959? A. No, sir.

Q. What is your telephone number at home? A. JUstice 4-7791.

Q. 7791? A. Right.

Q. JUstice 4-7791. How many telephones do you have in your house? A. Just one number.

Q. In whose name is it registered? A. My own.

Q. How long have you had that telephone there? A. Oh, twenty years, probably.

Q. Did you make that specific telephone call from the Justice number in your home? (74) A. No, sir.

Q. You are sure of that? A. Positive.

Q. But you are not sure in what locality, what city—A. That's right.

Q. —you made the telephone call from? A. I don't remember.

Q. Does the owner of that diner know you in Whippany? A. No, sir.

Q. Well, you only live several miles away, don't you? A. That's right.

Q. You are a well known individual in that locality, aren't you? A. I don't think so.

Q. You don't think so? A. No.

Q. You have many holdings there, don't you? A. No.

Q. Doesn't everybody know George Gottesman in that area? A. I don't know. I'd run for election if they did.

Q. You are the owner of horses, are you not? A. No, sir.

Q. Did you ever own horses? A. Yes.

Q. How many horses have you owned? (75) A. To my regret, eight.

Q. And you are a horse player, are you not? A. Once in a while.

Q. You have been a horse player for how many years? A. Twenty years.

Q. And you are associated with and connected with many people who engage in the sport of kings, are you not? A. I don't know whether you'd call them associated but some of them be.

Q. You know them, don't you? A. Yes.

Q. Do you know any of them from Rhode Island? A. Not too well. I know of them.

Q. You know them. You have talked to them, haven't you? A. That's right.

Q. What are their names? A. Well, there is a fellow almost my name I met up there, similar name to mine.

Q. Gottesman? A. Gottsman.

Appendix F—Excerpts of Testimony.
George S. Gottesman, for Petitioner—Direct.

Q. How do you spell that? A. G-o-t-t-s-m-a-n.

Q. Who else do you know from Rhode Island? A. There is Al Calorie.

Q. They are track habitues, are they not? (76) A. I wouldn't say that.

Q. They go to the track? A. I imagine so.

Q. They are betters? A. I wouldn't know.

Q. You wouldn't know that? A. No.

Q. How did you become acquainted with them? A. Just through horses at the track.

Mr. Combs: May I be heard at this time, your Honor?

Examiner Schwartz: You are objecting to the question?

Mr. Combs: I am objecting to the whole line of questioning, yes, first on the basis that it is wholly immaterial to the proceeding here, because Daniel Cecere is not a party to this proceeding, in the first place. That is something that has taken place in the courts, his conviction, and certainly——

Examiner Schwartz: Mr. Combs, may I interrupt for a moment. If it weren't for the incident which took place and involved Mr. Cecere, presumably there would have been (77) no cessation of telephone service at the Berkeley Bar. So this line of questioning has some materiality to the subject matter which apparently led to and is still continuing as a factor in the denial of telephone service at the Berkeley Bar. It is something which relates to it.

I am not at this time making any statement as to how much weight it may be entitled to or what the legal effect of it might be in this case, but I do say that it seems to be related to the question of the denial of telephone service at the Berkeley Bar, and I will allow it for that purpose.

Mr. Combs: All right. It seems to me—of course, there was a great deal more evidence than this telephone call, you may be sure of that, because we have the transcript of the record here before us.

Mr. Palmieri: We will offer it in evidence, the transcript.

Mr. Combs: That is here, too.

Examiner Schwartz: Mr. Combs, you are going to have an opportunity to cross (78) examine Mr. Gottesman, and if there are things which you feel were omitted on direct examination which must be filled in, you will have an opportunity to do so.

Mr. Combs: All right. The only other final thing is, he is certainly trying very hard to impeach this witness, whom he has called to the stand.

Examiner Schwartz: His witness is here under subpoena.

Mr. Combs: If he feels he succeeded, he will ask that his testimony be disregarded and not be taken into consideration.

Examiner Schwartz: It clearly appears that the witness is here under subpoena, and the witness says that he would not appear voluntarily. I think the witness indicated that.

Isn't that so, Mr. Gottesman?

Witness: That's right.

Examiner Schwartz: Proceed with the examination.

Q. This diner where you say you made this call from on March 21, 1959, was that the Paper Mill Diner? A. I don't remember. Somewheres around there.

(79) Q. Well was it or wasn't it? A. I don't remember.

Q. How many diners are there in Whippany? A. I don't know how many there are.

Appendix F—Excerpts of Testimony.
George S. Gottesman, for Petitioner—Direct.

Q. Is this the largest diner in Whippany? A. I have never been in any others around there, just one.

Q. This one?

Examiner Schwartz: Just a minute, Mr. Palmieri. The witness did not say he made this telephone call from the diner. He said he received the telephone number he called at the diner some two months earlier.

Mr. Palmieri: I stand corrected, your Honor.

Q. The diner that you refer to where this somebody that you didn't know gave you this number, is it a large diner in Whippany? A. I wouldn't remember.

Q. It was only a year ago. You don't remember? A. No, sir.

Q. Will you describe the person? What was his height? A. He sat next to me. I wouldn't know him from Adam.

Q. How old was he? A. I wouldn't remember.

(80) Q. How tall was he? A. I couldn't tell you.

Q. What was his weight? A. Couldn't tell you.

Q. What color hair did he have? A. I don't know.

Q. What color eyes? A. I couldn't tell you.

Q. What was his complexion? A. I wouldn't know.

Q. Would you be able to identify him if you saw him again? A. No, sir.

Q. Did he have a mask on or anything? A. No, sir.

Q. How was he dressed? A. I don't know. I am under a fever here. I shouldn't be here in the first place.

Examiner Schwartz: Mr. Gottesman has indicated he is not feeling too well. I wouldn't attempt in any way to question him in a manner which might be regarded as badgering.

Mr. Palmieri: All right.

Q. Mr. Gottesman, you called my office yesterday, did you not? A. I did, yes.

(81) Q. You said you had a doctor's certificate, is that right? A. I was going to bring it down.

Q. Do you have it with you? A. No, I didn't bring it down.

Q. When you made this telephone call from a station, public station, somewhere on Route 10, which locality or municipality you do not know, what number did you dial? A. I don't recall.

Q. Do you have the slip of paper on which you wrote this number? A. No, sir.

Q. Did you have the slip of paper on which you wrote this number at the time of the trial of Mr. Cecere before the Essex County Court? A. No, sir.

Q. You didn't have it then either? A. No, sir.

Q. What did you do with it on March 21, 1959, if you say you had this scrap of paper at the time when you called this number? A. Threw it away. It had no use for me.

Q. So that on March 21, 1959, you made this telephone call to this number and thereafter threw it away because it was of no further use to you, is that correct? A. Yes, sir.

(82) Q. Now, from March 21, 1959, to the present time have you ever called that number again? A. No, sir.

Q. Is there any way that you would know what that number is since March 21, 1959? A. No, sir.

Q. The only way you would know would be by referring to this scrap of paper which you threw away on March 21, 1959? A. That's right.

Q. Exactly how many months before March 21, 1959, did you jot down on this scrap of paper this number given to you by this man in this diner whom you cannot describe? A. Just a month, maybe, six weeks, somewheres around there.

Q. In reference to this man, Mr. Gottesman, could you identify his voice? A. No, sir.

Q. Couldn't identify his voice? A. No, sir.

Q. Now, do you know Matthew Kraft? A. I met him, yes.

Appendix F—Excerpts of Testimony.
George S. Gottesman, for Petitioner—Direct.

Q. Matthew Kraft is a State policeman? A. That's right.

Q. And you have known him for many years, haven't you? A. I don't think so.

Q. Well, four or five years? (83) A. He knows me probably better than I know him.

Q. You know Matthew Kraft and he knows you? A. Yes.

Examiner Schwartz: For approximately how long, Mr. Gottesman?

Witness: A few years.

Q. Would five years be a fair statement? A. Possibly, yes.

Q. And you had seen Matthew Kraft in and around the Succasunna area when he was assigned to the barracks there, is that correct?

Mr. Combs: I object. This line of questioning is certainly leading the witness, very much so, on direct examination. This isn't cross.

Examiner Schwartz: This isn't cross examination, this is direct examination.

Mr. Combs: I say, the type of questions that are being asked are definitely very leading, broadly so.

Examiner Schwartz: I don't consider them such in regard to Officer Kraft. He asked whether he knows Mr. Kraft and how long he knows him, and he is suggesting to the witness whether or not he knew him as (84) a result of the fact that the officer was assigned to a certain barracks. The witness can answer that. I don't consider that as leading from the viewpoint of the type of trial we have here. We are trying to arrive at the facts as quickly as possible. Proceed.

Q. So that you knew Matthew Kraft, the State Patrolman or State Trooper who was assigned to the barracks in

and around the Succasunna area, for four or five years prior to March 21, 1959? A. Approximately.

Q. And these State Trooper barracks are located where in reference to Succasunna? A. Netcong.

Q. How far is Netcong from Succasunna? A. About three miles, three or four miles.

Q. And Succasunna and Netcong is a sparsely populated area, is it not? A. It is all relative.

Q. It is all relative, yes. It is not like Newark or Orange? A. No.

Q. It is farm country by and large, with commercial in the center of the town? A. That's right.

(85) Q. You yourself live on a farm, do you not? A. It isn't a farm, it is wooded land.

Q. How many acres is it? A. I don't know.

Q. You don't know how many acres of land? A. No.

Q. All right. In any event, how many Troopers are assigned to that area? A. I wouldn't know.

Q. You knew Matthew Kraft, you say, four or five years, and I take it you had talked to him before March 21, 1959 and he had talked to you, in and around the area, not on business but socially or perhaps to pass the time of day? A. I don't know, maybe pass the time of day, that's about all.

Q. How many times would you say that you had seen him in the four or five years before March 21, 1959? A. A couple of times at the most.

Q. And he knew who you were and you knew who he was, isn't that so? A. I didn't know him as well as he said he knew me.

Q. When did he say that he knew you well? A. When I met him down in court.

Q. For how long a period of time did he say that he had known you? (86) A. He says, "You know me." I says, "If you say so, I do." He introduced and said where he knew me from, and he was right.

Q. He was in civilian clothes when he said that to you? A. That's right.

Q. Every time you had seen him, he was dressed in his State Trooper's uniform? A. I don't know. I may have met him in the Morristown courthouse.

Q. Was there any question in your mind that you knew Mr. Matthew Kraft for four or five years and he knew you, Mr. Gottesman? There isn't any dispute about that, is there? A. I don't think so.

Q. When you made this telephone call to this number, what was the toll charge? A. I don't remember.

Q. You have no recollection as to how much money you were required to put into the phone box before you got the other end of the wire? A. No, sir.

Q. Don't have the slightest idea? A. No.

Q. What time of the day was this, specifically? A. Just before noon, around noontime.

(87) Q. There is no question about the time, is there? A. I am just saying about that time. A couple minutes more or less or a half an hour.

Examiner Schwartz: Mr. Palmieri, may I inquire about how much longer you expect to be with this witness? It is about time to adjourn for lunch.

Mr. Palmieri: I will be through by 1:00, your Honor. We have ten minutes to go.

Examiner Schwartz: All right.

Q. I understand your testimony is quarter of 12:00 or noon, a couple minutes plus or minus one way or the other? A. Around noontime. If I remember correctly, somewheres around the noon hour.

Q. I am not trying to trap you, sir. A. I don't know what the purpose is all about.

Q. It is not for you to determine the purpose, it is for you to answer truthfully my questions. Did the bell ring after you deposited the required coins? A. Yes.

Q. Did someone pick up the receiver at the other end? A. That's right.

Q. Did you recognize the voice? A. No.

Q. Did the voice identify itself to you? (88) A. Well, from the way he spoke, I knew it couldn't be a man who knew much about——

Q. My question to you, sir, simply is, did the voice identify itself to you? A. No.

Q. Didn't say, "This is Dan Cecere," or, "This is Matthew Kraft"? A. No, it did not.

Q. And we already have in the testimony that you had never talked to Dan Cecere either in person or by telephone? A. Never even met him. Never knew who he was.

Q. Was the voice that answered—you have met him since—on that telephone the voice of Dan Cecere? A. I don't think so.

Q. Was the voice that answered the voice of Matthew Kraft? A. Well, I don't know whether it was his voice either.

Q. Did you know when you made the call and when this voice answered at the other end, that the answerer was Matthew Kraft? A. I don't know whether it was him, but it was someone that wasn't connected with—that knew any knowledge about horses.

Q. In any event, you did not identify the voice as being that of Matthew Kraft? A. I wouldn't think so. I wouldn't know offhand.

(89) Q. What did the voice say? A. "Do you want to place a bet," I think, something like that.

Q. What did you answer? A. I says yes.

Q. Did you ask for anybody specifically? A. I don't recall whether I did or not. I don't remember.

Q. Did you ask for a Danny? A. I may have asked for Danny.

Q. Did you know who Danny was? A. No, sir.

Appendix F—Excerpts of Testimony.
George S. Gottesman, for Petitioner—Direct.

Q. You testified that the person gave you a number to call? A. That's right.

Q. Do you want to change your testimony now and say that he also told you to call Danny at this number? A. He may have. I don't remember off hand now. It——

Q. It is a year old. Well, give us your entire conversation from the time the voice answered, to the end of it. A. I said, "I'd like to place a bet," and the party said, "What's the name of the horse?" I gave him the name of the horse and I said—I forgot the amount, but it was ten across the board. I think I used that term, and he didn't seem to know much about it, and I think he said——

Q. What do you mean by that? Just give me what you said to him and what he said to you. (90) A. "I want to place a bet," and he said, "I'll take it." I must have asked for some name, because he said he wasn't here or busy in the back, "I'll take the bet." When I gave it to him he didn't seem to be posted with the terminology, what I was talking about.

Q. Will you tell us just the conversation without making any conclusions or observations? What did you say to him and what did he say to you? A. "I'd like to place a bet on this horse," and mentioned the horse's name and the amount of money.

Q. What was the name of the horse and the amount of money? A. I don't remember off hand.

Q. All right. Did he answer to that? A. He says, "All right, I'll give it to the party."

Q. What did you say to that? A. I says, "Well, I'll call back in about an hour to verify" whether he placed the bet or not.

Q. On March 21, 1959, did you consummate or place a bet with Dan Cecere? A. No, sir.

Q. Did you consummate or place a bet with any of his agents, to your knowledge? A. No, sir.

Appendix F—Excerpts of Testimony.
George S. Gottesman, for Petitioner—Direct.

Q. Did you consummate or place a bet with the receiver of that call? (91) A. No, sir.

Q. Was a bet ever consummated with the receiver of that call? A. No, sir, because I called back and no one answered.

Q. Did you call back? After how much time did you call back? A. About a half an hour.

Q. And you say from your testimony that you called back in order to verify whether or not a bet had been placed or had been consummated? A. That's right.

Q. Did the voice at the other end ever identify itself to you? A. No, sir.

Q. Did you identify yourself to the voice? A. Yes.

Q. You said, "This is George Gottesman"? A. He asked for my name and address and I gave it to him.

Q. What did you say, George Gottesman-what? A. Succasunna.

Q. Did he say to you, "This is Matthew Kraft, George"? A. No, he didn't.

Q. He didn't? A. I don't think he did.

Q. He never disclosed to you who he was or what he was? A. No, I don't think he did.

Q. And he never identified himself to you? A. No.

(92) Q. Where did you make the second call? A. I don't remember.

Q. Well, now, you made a second call to verify whether or not the first call had been put through. Where did you make the call from?

Mr. Combs: I ask, has that been testified to by the witness?

Examiner Schwartz: Yes.

Q. Where did you make the second call from? A. I don't recall.

Q. Was it from your home? A. No.

Q. Never called from your home? A. No.

Q. Where do you usually call from? A. I am on the road.

Q. When you owned horses, did you run horses in Monmouth? A. I think so.

Q. And when you run horses in Monmouth, you are given a pass or card, are you not? A. Yes, you get an owner's pass.

Q. Sir? A. An owner's pass, yes.

Q. That pass is signed by a State Trooper, is it not? A. I don't know who signed it.

(93) Q. The pass which was issued to you, do you have it in your possession? A. I don't think so.

Q. When was it issued to you? A. I don't remember offhand.

Q. About how many years ago? A. A couple years.

Q. Prior to March 21, 1939? A. Yes.

Q. And the pass in your possession bears the signature of Matthew Kraft, does it or does it not? A. I wouldn't know.

Q. Do you have the pass? A. I will look and see if I have, if you want me to.

Q. Yes.

Examiner Schwartz: What does the signature purport to indicate, that is, the police officer's signature? Is that sponsorship?

Mr. Palmieri: Approval, I think, of the character and reputation of the person.

Witness: No, you are wrong.

Q. You tell us, Mr. Gottesman, because the Judge wants to know, what it means when the officer signs it. A. It would be signed by the track people, the people (94) that own the track, or their agent, either the secretary or—No, I haven't got it. The secretary of the association would usually sign it.

Q. The owners of the track? A. That's right.

Q. Kraft at that time when you received your pass was in charge of the issuance of these passes, was he not? A. I wouldn't know.

Q. Well, to your knowledge was he ever in charge of the issuance of passes at the Monmouth track? A. I said I have known about the pass, and that is not a pass, admitting pass. It shows you are the owner of a horse, something like this (producing).

Examiner Schwartz: Mr. Palmieri, are you inquiring if at that time Mr. Kraft worked for Monmouth Park?

Mr. Palmieri: That's right, assigned there by the State Police in a supervisory capacity.

Q. You don't have the pass with you now, is that right? A. No.

Q. And you don't know whether it bears the signature of Matthew Kraft or not? A. I wouldn't know.

Q. But you do know that Matthew Kraft was assigned to the (95) Monmouth track several years ago? A. I don't know.

Q. Did you ever see him there? A. No, sir.

Q. Did you ever see him there at the track? A. No, sir.

Q. Did you ever talk horses with Matthew Kraft? A. I don't think so.

Q. Well, now, I will ask that question again. You understand that you are under oath? A. I understand. You asked me a question. I met the man maybe a few times. I said I met him probably Morristown courthouse or thereabouts.

Q. I am not asking you where you met him, I am asking whether or not you ever discussed horses with State Trooper Matthew Kraft. A. I don't think so. I wouldn't have any occasion to.

Q. You might have? A. Possibly.

Q. Matthew Kraft plays horses, does he not? A. I wouldn't know.

Q. You don't know that? A. No.

Mr. Combs: How far afield can we go?

Q. One other question, and this is all: This diner in Whippany (96) that you have testified to, is it located on a corner or other than a corner, an intersection? A. I wouldn't know.

Q. How long have you lived in Succasunna? A. Twenty-odd years.

Q. And you use Route 10 quite often, through Whippany? A. That's right.

Q. You have no knowledge as to where this diner is, is that correct? A. Well, it is in Whippany. I wouldn't know which one.

Q. You have no knowledge of how many diners there are in Whippany? A. I didn't pay any particular attention.

Mr. Palmieri: No further questions.

Examiner Schwartz: Mr. Palmieri, before we proceed further, there could possibly be an insinuation here that a State Policeman plays horses.

Mr. Palmieri: Sir?

Examiner Schwartz: From the way you asked a certain question of Mr. Gottesman, there could be an insinuation that a State Policeman was playing horses. I wouldn't like the record to be left in that posture, Mr. Palmieri. It would be perfectly . l (97) right to ask the witness here whether or not he knew whether a certain officer had ever played horses, and of course he answered that he did not know, he had no such contact with this officer.

I just want to make it clear that there is nothing in the record here, up to this point, which implicates the State official or the State Police officer that we were talking about here with horse betting or playing in any shape or manner, as far as I know.

Now, let's talk about an adjournment.

Mr. Palmieri: Your Honor, I would like to say by my silence I do not acquiesce or concur in your Honor's observation.

Examiner Schwartz: You don't have to, Mr. Palmieri. But as of this moment, I don't think we can let the record stand with what might be regarded by some as an implication against the good character of an officer without some supporting proofs here.

I would like to talk for a moment about luncheon adjournment. I assume you (98) would like to cross examine Mr. Gottesman?

Mr. Combs: No. I do not intend to ask him any questions. I would like to be heard very briefly on a motion, and that will be all as far as Mr. Gottesman is concerned.

Mr. Palmieri: The petitioner's case is closed, your Honor.

Examiner Schwartz: You have witnesses?

Mr. Combs: I will have a witness, yes.

Examiner Schwartz: I will hear your motion.

Mr. Combs: I should like to move at this time that the testimony which has been given here by Mr. Gottesman be stricken from the record, as I consider it to be highly improper and wholly irrelevant to the issue before this Board. Please hear me out.

Examiner Schwartz: I am listening, Mr. Combs.

Mr. Combs: The reason is, the question of the guilt or the innocence of Mr. Daniel Cecere is by no stretch of the imagination an issue in this proceeding. Mr. Daniel Cecere in the first instance is not a party (99) to the hearing.

Secondly, the innocence or guilt of Mr. Daniel Cecere has been passed upon by a court of competent jurisdiction and he has been found guilty by a jury of his peers, guilty of bookmaking and conducting a place where others may come to bet. This I think is dispositive of the question

as far as this Board is concerned, for the reasons already stated.

Secondly, the only purpose in bringing Mr. Gottesman in here was to impeach him, impeach him as a witness and the testimony which he gave in the trial before the County Court of Essex. I say it is highly improper to do this, and this evidence certainly should never be received by this Board, again for the reasons already stated.

This man was a witness only as to the guilt or innocence of Daniel Cecere as a bookmaker, and as I say, that issue has been disposed of in the proper forum. Therefore, the purpose for bringing Mr. Gottesman here is merely an attempt to open up something which has been disposed of (100) in its proper place.

I say to your Honor and urge very strongly that all of the testimony that has been here given by Mr. Gottesman be stricken from the record, and I will defer and will announce it as my position that I refuse to ask any questions by way of cross examination of Mr. Gottesman.

Examiner Schwartz: With respect to your motion, Mr. Combs, as I have indicated earlier in connection with your first development of this particular subject, I believe that they are entitled to have this evidence presented here today by Mr. Gottesman in this matter. It has a bearing on the matter. The way in which his testimony will be evaluated in connection with the final determination of this matter is something else again, but I will allow it to stand in evidence and I will not grant your motion to have his testimony stricken.

Mr. Combs: I ask for an exception.

Examiner Schwartz: We will adjourn now until 2:15. Does anyone here want Mr. (101) Gottesman further?

(No response.)

Examiner Schwartz: You are excused, Mr. Gottesman.

(Luncheon recess.)

APPENDIX G.

Answering Affidavit of George Gottesman.

OFFICE OF
THE PROSECUTOR OF ESSEX COUNTY
NEWARK, N. J.

Case No.....

Statement of George S. Gottesman. Age 60.
Residence 4 Mark Lane, Succasunna, N. J.
Taken by Det. Charles H. Acocella.
Date May 20, 1960. Time 8:30 P. M. Place 4 Mark Lane, Succasunna.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss.:

1. Did Det. Matthew W. Kraft ever suggest to you that you telephone Dan Cecere's place of business and place a bet? No.

2. Has any Essex County law enforcement official requested that you place a bet by telephone at Mr. Cecere's tavern in Orange, New Jersey? No.

3. Has any law enforcement official ever suggested or requested that you make a bet by telephone any place in New Jersey? No.

4. Did you ever talk to Det. Matthew Kraft prior to the day he served a subpoena on you in your driveway? I may have in the past years, I wouldn't know. I may have run across him in the Morris County Court House or the Netcong Police Barracks. Prior to my seeing him at the time he served me with a subpoena in my driveway. I probably met him but I'm not sure.

GEORGE S. GOTTESMAN.

Sworn and subscribed to before me this 20 day of May 1960.

CHARLES H. ACOCELLA.

This affidavit is taken pursuant to chapter 39 of the Laws of 1958.

APPENDIX H.

Answering Affidavit of Matthew W. Kraft.

MATTHEW W. KRAFT being duly sworn according to law upon his oath deposes and says:

1. I am a detective 1/c of New Jersey State Police and have been with the New Jersey State Police for twenty-nine years.

2. On February 16, 1959 I was assigned to the Essex County Prosecutor's Office and I have been in such assignment since that date.

3. On March 21, 1959, I participated in an investigation at 140 South Essex Street, Orange, New Jersey, at which time Dan Cecere was arrested.

4. In the case of *State* vs. *Dan Cecere* I testified in part as follows: (D84a-16)

> "Q. Did you ever have any contact with Mr. Gottesman, who was the voice on the other end? A. Prior to the raid? No, sir.
>
> Q. When did you first meet Mr. Gottesman? A. Well, I first met him some time after this investigation. I served a subpoena on him at his home."

5. My attention has been called to a transcript of testimony by George Gottesman given before the Board of Public Utility Commissioners on April 27, 1960, as follows:

> "Q. You know Matthew Kraft and he knows you? A. Yes.
>
> "Q. Would five years be a fair statement? A. Possibly, yes.
>
> Q. How many times would you say that you had seen him in the four or five years before March 21, 1959? A. A couple of times at the most."

Affidavit H—Answering Affidavit of Matthew W. Kraft.

6. To the best of my knowledge and belief, I did not know George Gottesman prior to March 21, 1959, and met him for the first time when I was instructed by Prosecutor Byrne to serve a Grand Jury subpoena on Mr. Gottesman.

7. When I saw Mr. Gottesman in Court for the trial in the case of *State* vs. *Dan Cecere*, I introduced myself to Mr. Gottesman and I reminded him that I had seen him when I served the Grand Jury subpoena on him.

MATTHEW W. KRAFT,
Detective 1/c N. J. State Police.

Sworn to and subscribed before me
this 12th day of May, 1960.

LILLIAN A. BELLET,
Notary Public of New Jersey.
My Commission Expires Mar. 25, 1962.

APPENDIX I.

Court's Charge to the Jury.

(227) (The Court charges the jury as follows:)

GIULIANO, *J. C. C.*

Members of the jury, the Grand Jury of this county returned two indictments against the defendant, Dan Cecere. Indictment 1668 charges the defendant with bookmaking and Indictment 1669 charges the defendant with keeping a place to which persons might resort for the purpose of betting on the event of horse races. The indictments for the purpose of this trial have been consolidated. However, you are to consider each indictment separately and return a verdict on each of these indictments. I will not read the indictments to you. It is my recollection that the Prosecutor read them to you at the opening of the case. The indictments will be sent to the jury room where you may refer to them if you care to during your deliberations. The indictments are in statutory form. In a few moments I will explain to you each of the indictments and I will also explain to you the law that is applicable to each of these indictments.

Before doing that, however, I want to call to your attention certain fundamental principles of our criminal law which apply to this and all criminal (228) cases and which you should keep in mind and be guided by during your deliberations.

In the first place, the Court is the judge of the law. The Court is the sole judge of the law. As such it is the function of the Court to pass upon all questions of law arising in the trial and to inform the jury of the law governing the case. By reason of that rule it becomes the duty of the jury to follow the law as it may be stated by the Court. On the other hand, and with at least equal importance, you, the

jury, are the judges of the facts. You are the sole judges of the facts, and that means exactly that.

The Court has no power to decide or instruct the jury how to decide any question of fact because, as I have said, the jury are the sole and the exclusive judges of the facts. The jury are the final and the only judges of the weight of the evidence, the credibility of the witnesses, the inferences to be drawn from the evidence, and of all inferences, issues and questions of fact whatever, including the ultimate conclusion of guilty or not guilty to be reached after a consideration of all the evidence.

An inference, members of the jury, is a legal (229) deduction from a proven fact. The Court has the right and sometimes the duty to comment on the evidence and if the Court in commenting on the evidence should appear to the jury to lay undue emphasis on any phase of the evidence, the jury should disregard such emphasis of the Court and should remember in deciding the case the jury must do so not only on the evidence referred to by the Court but upon all of the evidence.

If the Court should state as its recollection of a fact something that does not coincide with the recollection of the jury, it is the duty of the jurors to disregard those expressions of the Court and to follow their own recollection. The same rule applies to any statement that either the Prosecutor or counsel for the defendant may have made during the trial or in their summations. If what they said concerning the evidence does not coincide with the recollection of the jury, it is the duty of the jurors to disregard those expressions and rely exclusively upon their own recollection.

The Court has the right, if it sees fit, to express its opinion of the evidence, pointing out what evidence, conditions or circumstances seem to the Court to be salient, controlling or persuasive, and (230) the Court has a right also to indicate any inferences or conclusions of fact which the

Court could or would or may draw from the whole or any part of the evidence, but the jury are in no way bound thereby and may disregard all or any of such expressions or comments or opinions of the Court if they see fit so to do.

The defendant in this case, as are defendants in all criminal cases, is presumed to be innocent and that presumption remains with him throughout the entire case, and unless the crime charged and each and all of its elements are proved beyond a reasonable doubt he is entitled to be acquitted. He cannot be convicted of any crime unless he is proved guilty thereof beyond a reasonable doubt. The burden of proving the guilt of the defendant beyond a reasonable doubt rests upon the State throughout the entire case and never shifts.

Now, what is reasonable doubt? Reasonable doubt, members of the jury, is not a mere possible or imaginary doubt because, as you may well know, everything relating to human affairs or depending upon oral testimony is open to some possible or imaginary doubt. By reasonable doubt is meant that state of the case which, after an entire comparison (231) and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

To state the rule in a positive way, if after an entire comparison and consideration of all the evidence you can say you feel an abiding conviction to a moral certainty of the truth of the charge, you are then satisfied beyond a reasonable doubt within the meaning of that expression in the law.

Reasonable doubt may arise also from a want of evidence or a lack of proof. If you find that the State has failed to produce evidence sufficient to satisfy you of the defendant's guilt beyond a reasonable doubt he is entitled to an acquittal even though the doubt may be engendered by the lack of production of evidence by the State.

An abiding conviction to a moral certainty is a settled, fixed, lasting or continuing conviction of the guilt of the defendant. Unless you have such a conviction this defendant cannot be found guilty of the charges set forth in each of these indictments.

(232) Now to revert to the indictments. You will understand that an indictment, that is, the finding of an indictment by the Grand Jury, is no evidence of the guilt of the defendant. It is merely a step that is necessary in our criminal process so that the defendant may be brought on for trial before a court such as this and a jury such as you for determination of his guilt or innocence. The indictments have no probative value whatsoever on the issue of the guilt of the defendant.

The first indictment charges in effect that the defendant, Dan Cecere, on the 20th day of March 1959 did in the City of Orange unlawfully make and take what is commonly known as a book on horse races and the second indictment charges in effect that the defendant, Dan Cecere, on the 21st day of March 1959 did keep a place in the City of Orange to which persons might resort for the purpose of betting on horse races.

The statute of our state on which these indictments are based in so far as it is pertinent here provides as follows: "Any person who shall habitually or otherwise make or take what is commonly known as a book upon the running, pacing or trotting, either within or without this state. (233) of any horse, mare or gelding, or shall conduct the practices commonly known as bookmaking, or shall keep a place to which persons may resort for engaging in any such practices, or for betting upon the event of any horse race or other race or contest, either within or without this state, or for gambling in any form, is guilty of a misdemeanor."

This statute further provides: "This section shall not be construed to apply to pari-mutuel betting at race meet-

ings as authorized by the constitution of this state or any statute passed in pursuance thereof."

Now, you may recall in 1939 an amendment to our state constitution to permit betting or wagering at pari-mutuel race tracks was approved by the voters of the State of New Jersey and in 1953 a further amendment to our constitution to permit bingos and raffles was also approved by the voters of the State of New Jersey. Pursuant to these amendments such betting and the conducting of bingos and raffles were permitted and enabling legislation was adopted by the Legislature to accomplish the purposes of these amendments. Prior to that time our law against (234) gambling was all-embracing and the only exceptions to the over-all prohibition at the present time are the betting or wagering made at pari-mutuel tracks and limited wagering at bingos and raffles conducted by certain approved organizations.

Members of the jury, I will first discuss bookmaking, the thing denounced as a crime by this statute, that is, the making or taking of what is commonly known as a book on horse racing.

Under this statute, bookmaking in common understanding signifies the making of a book of bets, that is, the making or taking or recording or registering of bets or wagers on races or kindred contests. Bookmaking imports some method of recording bets on horse racing or kindred contests. Bookmaking, as I have defined it to you, and as referred to in this state, is unlawful in New Jersey, and it always was.

In order to justify a conviction on the indictment charging bookmaking, under the statute the State has the burden to prove beyond a reasonable doubt that the defendant recorded or registered the bets on horse races and at the time he had the intent to make and take what is (235) commonly known as a book of bets on horse races. If proof

of one of these elements is lacking there can be no conviction on this indictment.

First as to the element of recording or registering bets on horse races, under our law, members of the jury, it is not necessary that witnesses be produced to testify that they saw an accused record or register bets on horse races. However, it must be established from all the evidence that the defendant did record or registered these bets or that the bets were recorded or registered by some other person for the defendant and at his direction. In determining this question you may consider the finding of certain exhibits on the defendant's person and the surrounding circumstances that existed at the time.

As to intent, you realize that intention is a condition of the mind and can only be determined by reference to conduct or from inferences from conduct, words, or acts. Intent means a purpose to do something, a resolve to do a particular act or to accomplish a certain thing. The intention of accused may be gathered from his acts and conduct and from all he said and did at the particular time and from all the surrounding circumstances (236) that existed at the time and place.

On one phase of the case the State contends that the defendant undertook to engage in flight, undertook to flee from his place of business shortly after the police arrived at his tavern, and that in doing so the State contends he had in his possession the book of bets and an Armstrong scratch sheet dated March 20, 1959, which are marked as exhibits in evidence.

If you believe from the testimony beyond a reasonable doubt that the defendant knowing of the acts in which he had engaged and for the purpose of evading an accusation based on those acts took refuge in flight, then you can consider that flight in connection with all other testimony and evidence in the case because if unexplained the flight of a

defendant after the commission of a deed is a circumstance tending to prove consciousness of guilt.

So that there will be no misunderstanding, I will repeat what proof is required in order to justify a conviction on the indictment charging bookmaking. You must be satisfied beyond a reasonable doubt as I have defined it to you that the defendant (237) recorded or registered the bets and that he had the intent to make and take what is commonly known as a book of bets on horse races.

Now, as to the indictment which charges that the defendant did keep a place known as 140 South Essex Street, Orange, New Jersey, to which persons might resort for the purpose of betting on the event of horse races, in order to justify a conviction on this indictment under the statute the burden is on the State to prove two essential elements beyond a reasonable doubt as I have defined it to you. These elements are, one, that the defendant knowingly kept a place where persons might or should resort for the purpose of betting or wagering on horse races, and, two, that he kept that place with the intent at the time that persons might and should resort for such purpose.

If proof of one of these elements is lacking there can be no conviction on this indictment. Under the statute proof by the State of frequent or habitual repetition of such activity is not required. Knowledge may be proved either by direct evidence or by facts or circumstances which impute guilty knowledge. Intention, as I have already charged (238) you, is a condition of the mind and can only be determined by reference to conduct or from inferences from conduct, words or acts. Intent means a purpose to do something, a resolve to do a particular act or to accomplish a certain thing. However, it is not necessary, members of the jury, that witnesses be produced that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and conduct and from all he said and did at the particular time and

place and from all the surrounding circumstances that existed at the time and place.

It would appear to the Court that in so far as the second indictment is concerned the State contends its case is based substantially on circumstantial evidence together with some direct evidence. It is necessary that you understand what circumstantial evidence is because I am rather inclined to believe that it is something quite different from what the ordinary layman thinks it is.

—To convict by circumstantial evidence does not mean by any means that a jury is justified in convicting by guesses. The law respecting (239) circumstantial evidence is quite clear and may be stated as follows: An accused may be convicted on circumstantial evidence but the first inquiry in an issue resting upon circumstantial evidence is whether the facts sworn to are satisfactorily proved. This involves a consideration of the credibility and the accuracy of observation and memory of the witnesses by whom such facts are testified.

In the next place, assuming that the facts sworn to by the witnesses are satisfactorily proved, then the further inquiry arises as to whether the facts proved are explained or explainable on any other rational conclusion than that the accused is guilty, whether the inference of guilt deducted from such fact is in the judgment of the jurors sufficiently strong to justify a conclusion beyond a reasonable doubt that the accused is guilty, tested by the consideration whether the facts proved are capable of being reconciled with the hypothesis of innocence.

Circumstantial evidence cautiously dealt with in conformity with the legal principles I have stated is frequently regarded as the most satisfactory proof that jurors can rely upon. A conviction may be had (240) upon circumstantial evidence alone if that evidence is so clear and strong as to convince you beyond a reasonable doubt of the guilt of the defendant.

In order to justify a conviction on circumstantial evidence all the circumstances not only must concur to indicate the defendant's guilt but they must be inconsistent with any other rational conclusion. It is not enough that they coincide to render probable the hypothesis advanced by the prosecution. They must also exclude beyond a reasonable doubt every other hypothesis except that of guilt.

This case, members of the jury has been rather long and you listened to the testimony attentively and heard rather extensive and complete summations by the Prosecutor and counsel for the defendant in which they have analyzed the facts. I think no purpose would be served by me reviewing the evidence in any detail. I shall undertake to point up for you the issues as they appear to the Court to present themselves and while I am doing this I want to again caution you to keep in mind what I said before, that you and not the Court are the sole judges of the facts. It is your recollection that controls and not that of the Court. You are to decide the case not only on the evidence to which I may refer but on all the evidence, including the (241) exhibits that are marked in evidence.

The State offered proof to indicate that on March 21, 1959 at about 12:35 p. m. Prosecutor's Detectives Jerome DeStefano and Peter Kenny, together with Sergeant Matthew F. Kraft of the New Jersey State Police, went to 140 South Essex Street, Orange, New Jersey, a tavern owned and operated by the defendant, Dan Cecere.

The first officer to enter the tavern was Detective DeStefano who went immediately to the rear room. There were at the time about eighteen or twenty men at the bar. As soon as Detective DeStefano arrived in the rear room he observed the defendant and a colored man standing near the Skilo machine. At the time the defendant was in the process of handing to this man some cash. It was

developed later that the defendant had in his possession several checks, one of which was in the name of the man receiving this cash.

As soon as the officer arrived in the rear room he showed his badge and stated that he was on the premises for the purpose of making a gambling investigation. The officer then observed about four feet away from the defendant that there was seated at a table a colored man and standing near (242) the table was another colored man. The man seated at the table had in his hand at the time a pencil and before him was a piece of paper on which was written the names of two horses entered in races to be run at a race track described as Gulfstream Park. This sheet had been removed from a pad of Rheingold ballots which was also on this table. The defendant then started toward the front door. The officer yelled, "Stop that guy. Don't let him get away."

As the defendant got to the door he ran into Detective Kenny. There was a struggle at the door and the defendant succeeded in getting away. The defendant, as he attempted to leave the premises, it was testified, tried to remove his coat. The defendant was caught by Detective Kenny and Sergeant Kraft a few feet away from the front door of the tavern. The defendant had by this time removed his coat and was holding it with both arms. The defendant was then taken to the rear room where he was ordered to empty his pockets. He became loud and abusive, it was testified to, and yelled something to the effect, "Look what they are doing to me. Don't let them do it. Call my lawyer."

(243) He then removed from his pockets cash in the sum of about $666 and several checks. The defendant also took from his coat pocket an Armstrong scratch sheet. He was again asked to empty his pockets, he refused and repeated the remark he had yelled out previously.

The officers then took from his coat pocket a green notebook which had in it a sheet on which it was testified were written horse bets in the sum of some $3500, of which bets about $1820 had been laid off. The officers also found on the premises the Morning Telegraph and the Armstrong scratch sheet, both dated March 21, 1959.

While the officers were concerned with the defendant two colored men who had been at the table in the rear room and several of the other patrons left the premises. The officers searched 18 other persons and they also searched the premises and found nothing in this search pertaining to gambling. While the officers were on the premises the telephone rang, which was answered by Sergeant Kraft. The person calling identified himself as George Gottesman and asked for Dan. He was told by the officer that Dan was busy and then asked that a bet of $20 and $10 be placed on Wise Master, (244) a horse entered in a race at Lincoln Downs. The State produced George Gottesman who corroborated the testimony of Sergeant Kraft. This witness also stated that he did not know the defendant and this was the first time he tried to place a bet at the premises in question.

The State contends from all of its proofs that it has established the guilt of the defendant beyond a reasonable doubt on both of these indictments and asks at your hands a verdict of guilty on both indictments.

Now, the defendant interposes in this case a defense of denial. He contends the State has not established his guilt beyond a reasonable doubt and asks at your hands a verdict of not guilty on both indictments.

You will remember, and I charge you this as a matter of law that the defendant did not take the witness stand in his own defense. Under our law a defendant cannot be compelled to testify but he is competent to testify and he has a right to testify. His failure to be a witness in his

own behalf raises no presumption of guilt but if facts are testified to which tend to prove his guilt, which facts he could by his oath deny, his (245) failure to testify in his own behalf raises a permissible inference, and you will remember my definition of inference, that he could not truthfully deny those facts.

You will note I said facts which he could by his oath deny. The facts in this case which the Court recalls which the defendant could by his oath deny are these—but again use your own recollection—one, the testimony of the officers that the defendant had on his person a sheet on which there were recorded alleged horse race bets; two, the testimony of the officers as to the attempted flight of the defendant; three, the testimony of the officer as to what occurred in the rear room at the table in the defendant's presence; four, the testimony of the officers as to their finding an Armstrong sheet on this table and a Morning Telegraph in the defendant's place of business; and, five, the testimony of the officer as to the use of the telephone in the defendant's place of business. However, I charge you that it is our law that the defendant here is entitled to have you consider all the facts in evidence, even if he does not deny by his own oath such facts as incriminate him or tend to incriminate (246) him, and he is entitled to the presumption of innocence, unless and until you, the jury, agree on a verdict of guilty upon a consideration of all the evidence.

Now, there is another matter which I want to call to your attention and that has to do with the prior conviction of crime of this defendant.

The law as to the effect of a prior conviction of crime is as follows: A prior conviction, of course, members of the jury, does not prove, nor does it tend to prove, the defendant's guilt of the crimes presently charged against him. The law permits convictions to be shown for one purpose

and that one purpose is affecting the credibility of the defendant.

The defendant in this case did not take the witness stand. Therefore you cannot consider the evidence of a prior conviction against this defendant.

During the course of the trial the defendant produced what are generally known as character witnesses. The law with respect to that phase of the case is as follows: Evidence of good character or reputation of an accused is always competent on the trial of an issue such as this and is entitled (247) to be considered by the jury. You, as the jury, should consider all the relevant testimony, including that relating to the defendant's good character or reputation, and if on such consideration there exists reasonable doubt of his guilt, even though that doubt be engendered merely by his previous good repute, he is entitled to an acquittal, but if from the entire evidence including that relating to good character or reputation, you, the jury, believe the defendant guilty beyond a reasonable doubt he should not be convicted and the evidence of good character should not alter the verdict.

The defendant, based upon the law and the facts, urges that you cannot find the State has sustained the burden of proof beyond a reasonable doubt that he is guilty of the charges.

The State, on the other hand, urges that based upon the law and facts you must find the defendant guilty of the charges set forth in these indictments.

Now, members of the jury, the defendant through his attorney has submitted certain requests to charge. That procedure is perfectly proper.

As to request No. 7, I will charge in part. Under our law it is not a statutory offense to place (248) a bet.

No. 9: I charge you that evidence of a telephone conversation may be considered by you to show the defend-

ant's complicity in the offense charged in the indictment only when the circumstances surrounding the making of the call rebut every suspicion that the same may be spurious, and when it is so identifies the one initiating the call and the person whom he calls as associates in the enterprise on which the indictment is based.

We also have a proposition of law which I will charge you. It is this: If you believe any witness in this case, that is, for the State or for the defendant has wilfully, knowingly, or intentionally given or made a false statement or has testified falsely relating to or concerning a material fact in the case, then you, the jury, may reject all or any portion of the testimony given by such witness.

All that I have said on the subject of guilt must be considered by you, the jury, in the light of the paramount instructions I have given you at the outset of the charge with respect to the burden of proof, namely, that the burden of proof is on (249) the State to prove the defendant guilty beyond a reasonable doubt as I have defined it of the charges, and that burden never shifts. The rule is an ultimate one surviving all others. It is independent and it is the final protection to the defendant, and notwithstanding all other inferences and burdens, it remains upon the State throughout the entire trial and until all the evidence is in when it becomes the duty of the jury to decide whether or not the burden has been met.

As I have charged you, these indictments have been consolidated for the purpose of this trial. However, you are to consider each indictment separately and return a separate verdict as to each indictment. I would suggest that you consider these indictments in numerical order. However, you are not bound by my suggestion. You have the right to take up these indictments in any order convenient to you.

If after a consideration of all the evidence in the case you reach the conclusion that it has not been demonstrated beyond a reasonable doubt that this defendant is guilty as charged in either of these indictments, then your verdict must be, (250) "We find the defendant not guilty on both indictments."

If after a consideration and comparison of all the evidence in the case you reach the conclusion that it has been demonstrated beyond a reasonable doubt that this defendant is guilty as charged in one of these indictments and you reach the conclusion that it has not been demonstrated beyond a reasonable doubt that this defendant is guilty as charged in the other indictment, then in your verdict you will state the charge and number of the indictment on which you find the defendant guilty and also state the charge and number of the indictment on which you find the defendant not guilty.

Now, again as to your verdict, you may find the defendant not guilty on both indictments. You may find the defendant guilty on both indictments. You may find the defendant guilty on one of the indictments and not guilty on the other indictments.

You will disregard all arguments between counsel and the Court and not speculate on reasons for objections to testimony or to the admission of exhibits. These were all rulings on matters of law exclusively within the province of the Court. It was my duty to rule on those objections. I (251) instruct you now that any ruling I made during the course of the trial on any objection made by either counsel should not in any way influence you in your deliberations or in your decision of the case. It should be no indication whatsoever to you of any feeling that I may have one way or another as to the guilt or innocence of this defendant. I was merely performing the duty imposed upon me in trying to decide the particular legal question at the

time presented. You will place no importance on the fact that the Court at times asked questions of the witnesses. It should be no indication whatsoever to you of any feeling one way or another as to the guilt or innocence of this defendant, that is, any indication of my feeling. The Court may interrogate witnesses for the purposes of eliciting facts material to the trial.

Now, what are the facts? That is what you must decide, for you, in your capacity as jurors, are the sole, the final, the conclusive and the ultimate judges of the facts.

The weight of the testimony is never dependent upon the number of witnesses. In your capacity as jurors you have a right to evaluate the demeanor of the witnesses as you listen to them, the manner in (252) which they testify, to judge the comparative degree of frankness of the witnesses and to draw reasonable inferences from the testimony as you heard it. All of these things fall peculiarly within your province as judges of the facts.

Finally, members of the jury, you will decide this case without sympathy for or prejudice against the witnesses for the State and without sympathy for or prejudice against the defendant and the witnesses for the defendant. It is your duty to decide this case fairly and impartially on all the evidence and on the evidence alone and return your verdict accordingly.

This being a criminal case, any verdict rendered by you must be a unanimous verdict.

Members of the jury, both counsel for the defendant and counsel for the State have a right to be heard with respect to the Court's charge before you begin your deliberations, and any statement that they may make or any objection that they may make or any suggestion that they may make must be made out of the presence of the jury. I will therefore let you go to your jury room at this time but please do not begin your deliberations yet.

(253) You may be excused for a few minutes.

(The jury retires to the jury room.)

The Court: Before we begin, Mr. Connell, I would like to state that as to requests 1, 2, 3, 5, 6 and 8, I believe I have covered those in my charge, but in so far as I have not the requests are denied. As to request No. 4, the request is denied.

Mr. McKeown: I only have one thing, if your Honor please, and it is not an exception to your Honor's charge. I think you in your charge to the jury stated that the scratch sheet in the possession of the defendant was dated March 20. Actually that scratch sheet was dated March 21.

The Court: Well, of course it is the recollection of the jury. I think I stated in reviewing the facts March 20 or March 21, and unless there is some reason why I should instruct the jury further—they have been instructed several times it is their recollection and not the Court's that controls and they will have the scratch sheets in the jury room. I am sure that they will examine them, and if the Court has been in error I stand corrected, but I am sure it will have no effect on the jury's deliberations.

Mr. McKeown: I don't think so.

(254) Mr. Connell: If your Honor please, I would like the record to note my exception to your Honor's failure to charge the requests I asked.

The Court: I think I have covered every one of them with the exception of No. 4 and I have charged generally what you wanted in No. 7 and as to No. 9 I charged completely with the exception of, I think, two words.

Mr. Connell: The only one I have reference to, your Honor, is No. 6, which you have stated that you deny, and No. 4.

The Court: All right.

Mr. Connell: I would just like the record to note my objection.

The Court: Yes. I think I ought to state for the record, of course, I am denying No. 6 except as I have charged.

Mr. Connell: There is one thing that I noticed in your Honor's recitation of Detective DeStefano's testimony and that had to do with the loud and abusive language of the defendant and your Honor struck the term *abusive* on my request, on my motion.

The Court: All right. I will instruct the jury to disregard it so far as I am concerned. I am (255) sorry I stated that but I think I took it from my notes. I will certainly ask the jury to remove it from their consideration.

Mr. Connell: Thank you, sir.

The Court: Nothing further, gentlemen?

Mr. McKeown: Nothing.

(The jury returns to the jury box.)

The Court: Members of the jury, two things have been brought to my attention and they deal with the recitation by the Court of the evidence offered on the part of the State. My attention first was called to the facts that I said that on the defendant's person was found an Armstrong scratch sheet dated March 20, 1959. It has been called to my attention that that scratch sheet was dated March 21, 1959. It has been further called to my attention that in my review or recitation of the facts that I stated that the defendant at the time Detective DeStefano was in the rear room became loud and abusive. I recall now that I struck the word *abusive* because it was a conclusion, that is, I struck it from the record. I will ask you now to forget that I used the word abusive and consider in the recitation that the defendant is alleged to have been loud. (256) Abusive will be removed from your consideration.

After the officers have been sworn you may take the case.

(The officers are sworn.)

(The jury retires to the jury room.)

Appendix I—Defendant's Requests to Charge.

(258) DEFENDANT'S REQUESTS TO CHARGE.

1. The evidence presented by the State to sustain the charge against the defendant as set forth in the indictment is circumstantial in character, there being no direct testimony or evidence offered to prove the same. In this posture of proofs, I charge you that in order to justify a conviction on circumstantial evidence, all the circumstances not only must concur to indicate a defendant's guilt, but they must also be inconsistent with any other rational conclusion. It is not enough that they coincide to render probable the hypothesis advanced by the prosecution; they must also exclude beyond a reasonable doubt every other hypothesis except that of guilt.

2. I charge you that if the State has failed to prove evidence sufficient to satisfy you of the guilt of the defendant beyond a reasonable doubt the defendant is entitled to an acquittal even though the doubt may be engendered merely by lack of production of evidence by the State.

I charge you that if you find the evidence bearing upon the guilt or innocence of the accused is reasonably susceptible of two constructions, one of guilt, and one of innocence of the accused the latter should be adopted.

(259) 3. I charge you that it is the right of a person charged with a crime to have all the relevant testimony including that relating to his good character or reputation, considered by the jury in every case, and if, on such consideration, there exists reasonable doubt of his guilt, even though that doubt be engendered merely by his previously good reputation he is entitled to an acquittal.

The relevance of character evidence is firmly imbedded in our law and may be considered by you to generate a reasonable doubt of the guilt of the accused.

4. Where evidence is merely circumstantial, so that the defendant could only meet such evidence by a general de-

nial of the charge, he does not have to testify and he cannot be criticized for such refusal to testify nor can the jury infer any guilt from his failure to give evidence.

5. I charge you that the Statute requires that a person charged with keeping a place to which persons may resort for gambling in any form requires that the person charged in order to be guilty must have kept the place with intent that persons might resort there for gambling. This differs from the case of an indictment for keeping a disorderly house at common law, where intent is immaterial.

(260) 6. I charge you that the Rule of law is that flight does not carry with it a rebuttable presumption of guilt. There can be no presumption of guilt in a criminal matter, for always there is a presumption of innocence and the two cannot co-exist. Defendant did not testify so the Court must have construed his plea of "Not Guilty" as a denial of flight as well as of the crime charged.

7. I charge you that it is a substantive statutory offense with penalty, to make a book and take bets; it is not a substantive statutory offense (with penalty) to place a bet.

8. I charge you that the term "Bookmaking" in its common meaning, which is the meaning in which the term is used in both the amendments of the State Constitution adopted in 1897 and in 1939 outlawing bookmaking by name, and in the enforcement acts for each amendment, meant the making or taking and recording or registering of bets or wagers on races and kindred contests.

9. I charge you that evidence of a telephone conversation may be considered by you in this deliberation to show the defendant's complicity in the defense charged in the indictment only when the circumstances surrounding the making of the call rebut every suspicion that the same (261) may be spurious, and when it so identifies the one initiating the call and the person whom he calls as associates in the enterprise on which the indictment is based.